No. 1040

IN THE

Supreme Court of the United States

October Term, 1991

PENTHOUSE INTERNATIONAL, LTD.,

Petitioner,

against

EDWIN MEESE III, Attorney General of the United States, HENRY E. HUDSON, DR. JUDITH VERONICA BECKER, DIANE D. CUSACK, PARK ELLIOTT DIETZ, JAMES C. DOBSON, EDWARD J. GARCIA, ELLEN LEVINE, HAROLD (TEX) LEZAR, REV. BRUCE RITTER, FREDERICK SCHAUER and DEANNE TILTON-DURFEE, Members of the Attorney General's Commission on Pornography, and ALAN EDWARD SEARS, Executive Director of the Attorney General's Commission on Pornography,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(7326—LC5-169—1991)

Questions Presented

1. Where government officials employ intimidation and coercion by:

(a) threatening to blacklist distributors of constitutionally protected materials,

(b) implying that distributors who do not remove such materials from circulation and sale will be criminally prosecuted, and

(c) suppressing constitutionally protected materials by means of deceit and false representations,

are they entitled to the privilege of qualified immunity?

2. Have government officials exceeded the scope of their discretionary authority, so as to deny them the privilege of qualified immunity, where they employ deceit for the express purpose of suppressing constitutionally protected materials?

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Petitioner Penthouse International, Ltd. prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 19, 1991, as amended on August 27, 1991.*

*Petitioner's parent company is General Media Publishing Group, Inc. Petitioner has no subsidiaries.

The Court of Appeals viewed as a "constitutional issue of first impression" (160) the government's right to criticize publications it disapproves of, even where such conduct amounts to outright censorship. The decision of the court below approves the use of coercion and blacklisting as a means of informal governmental censorship, undermines the principle behind *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963), and permits government officials to engage in deliberate suppression and restraint of constitutionally protected materials with impunity.

Opinion Below

The opinion of the Court of Appeals for the District of Columbia Circuit, as amended, is reported at 939 F.2d 1011, and appears in the Appendix hereto at 1a.

Jurisdiction

The opinion of the Court of Appeals for the District of Columbia Circuit was entered on July 19, 1991. A timely petition for rehearing *en banc* was denied on September 24, 1991 (21a-24a). This Court's jurisdiction is invoked under 23 U.S.C. §1254(1).

Constitutional Provision Involved

The First Amendment to the United States Constitution: "Congress shall make no law . . . abridging the freedom of speech or of the press. . ."

Statement of the Case

This is a constitutional tort action for money damages, brought under the doctrine of *Bivens v. Six Unknown*

Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), by the publisher of *Penthouse* magazine. The defendants include the eleven individual members of the Attorney General's Commission on Pornography (the "Commission" or "Meese Commission") and the Commission's Executive Director.

The Meese Commission was established on February 22, 1985, pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. §1 *et seq.* and was disbanded by Attorney General Meese after issuing its Final Report in July 1986.

The Commission's charter describes its purpose "to determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees" (2a).

Straying from this limited mandate, however, the Commission embarked upon a course of conduct deliberately designed to cripple petitioner's financial viability by interfering with its distribution system on a nationwide scale. The single largest retail sales outlet for *Penthouse* magazine was the Southland Corporation, the corporate owner of the ubiquitous 7-Eleven convenience chain. The Commission singled out the Southland Corporation for a particularly intense campaign of censorship by intimidation. One of the Commissioners personally called Southland's General Counsel and Vice President to falsely inform him that in its Final Report the Commission would link the magazines in question to child abuse (4a). This was a rather sensitive issue to Southland because of its concerted and publicly visible efforts to combat child abuse (4a). No such finding

was ever made by the Commission, but its threat surely had the intended impact of limiting the distribution of sexually-oriented but constitutionally protected materials.

The Commission conducted public hearings across the country, during which it received testimony from some 200 witnesses (2a). At one such hearing in Los Angeles on October 17, 1985, a written statement was submitted by Reverend Donald Wildmon, Executive Director of the National Federation of Decency and a well-known religious zealot.[1] In his statement, Reverend Wildmon accused several well-known corporations of distributing "pornography," which in his view included *Penthouse* magazine (3a). Acting as the instrument for Reverend Wildmon and others who share his convictions, the Commission achieved what years of organized protests had failed to accomplish—causing retailers such as Southland Corporation to discontinue selling *Penthouse* magazine.

Following its clandestine telephone call to Southland, the Commission mailed a letter dated February 11, 1986, to Southland Corporation and twenty-two other leading distributors and retailers who had been targeted by Reverend Wildmon. The letter was sent on the stationery of the United States Department of Justice, which includes its official seal, and stated (3a-4a):

> Authorized Representative:
>
> The Attorney General's Commission on Pornography has held six hearings across the United States

[1]For years, Reverend Wildmon has spearheaded organized protests aimed at destroying the distribution of constitutionally protected materials of which he and his followers disapprove. His boycotts and picketing, however, had no discernible impact upon the sales of *Penthouse* magazine, until he was able to influence the Commission to take certain actions.

during the past seven months on issues related to pornography. During the hearing in Los Angeles, in October 1985, the Commission received testimony alleging that your company is involved in the sale or distribution of pornography. The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final report section on identified distributors.

You will find a copy of the relevant testimony enclosed herewith. Please review the allegations and advise the Commission on or before March 3, 1986, if you disagree with the statements enclosed. Failure to respond will necessarily be accepted as an indication of no objection.

Please call Ms. Genny McSweeney, Attorney, at (202) 724-7837 if you have any questions.

Thank you for your assistance.

Truly yours,
s/Alan E. Sears
Alan E. Sears
Executive Director

enc: Self-Addressed
Postage Paid Mailing Label

Attached to the letter was the prepared statement submitted by Reverend Wildmon to the Commission (3a), but neither the letter nor its attachment revealed that the source of the statement was Reverend Wildmon. The attached statement was entitled "Pornography in the Family Marketplace" and provided in part as follows:

> The general public usually associates pornography with sleazy porno bookstores and theatres. However, many of the major players in the game of pornography are well-known household names. Few people realize that 7-Eleven convenience stores are the leading retailers of porn magazines in America.
>
> Indeed, 7-Eleven is perhaps the most important key to successful marketing of pornography in the family marketplace. In my opinion, should 7-Eleven discontinue the sale of porn magazines, both Playboy and Penthouse would be seriously crippled financially . . . Erwin Billman, then Executive Vice President of *Penthouse* magazine, testified that Southland Corporation (7-Eleven) was the single most important outlet for the sales of *Penthouse* magazine . . .
>
> * * *
>
> Pornographic magazines rely heavily for their circulation on single-issue or over-the-counter sales in addition to subscriptions. Therefore their display at newsstands and in stores is vital to their existence. In fact, the subscription market of *Penthouse* magazine *amounts to only 5 percent of total sales.* Only 202,807 subscribed to *Penthouse* magazine during the last half of 1984, but 3,568,517 were purchased monthly over the counter. . . .

The anonymous statement expressly characterized petitioner's magazine as "pornographic," singled out Southland Corporation as "the leading retailers of porno magazines in America" and predicted that "should 7-Eleven discontinue the sale of porno magazines, both Playboy and Penthouse would be seriously crippled financially." The clear focus of the letter was to emphasize that an apparently authoritative

source had identified the addressee as a purveyor of "pornography" and that the Attorney General, through his Commission, would issue a blacklist consisting of a "final report section on identified distributors."

After receiving the Commission's letter, Southland Corporation, Rite Aid Drug Stores, Revco, Thrifty Drug, Dart Drug and others discontinued selling *Penthouse* magazine as well as other publications. The chilling effect of the letter even caused them to discontinue the sale of magazines of a non-explicit nature, such as *American Photography* and *Texas Monthly*. These retail chains, which franchised or operated thousands of stores nationwide, were careful to immediately inform the Commission of their "corrective" action. Thus, in order to avoid being blacklisted, they stopped selling the magazines.

The Commission's threats of public denunciation and opprobrium achieved the intended results. In the minds of these retails outlets, and the public generally, the fear of being branded a purveyor of "pornography"[2] would be ruinous to their business—the "fear of community hostility and economic reprisals," *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1968), plainly outweighed the lost revenues that would result from dropping *Penthouse* magazine. Of course, the financial consequence to petitioner was disastrous.

Implicit in the acts of the Commission was the promise to retailers that if they discontinue selling *Penthouse* magazine, they would not be listed in the Commission's Final Report and need not fear public recrimination. Understandably, there was widespread and immediate reaction to the threat of blacklisting and of criminal prosecution.

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[2]In its Final Report at p. 228, the Commission acknowledged that "[t]o call something 'pornographic' is plainly, in modern usage, to condemn it. . . ."

Because the letter was on Department of Justice stationery containing the official seal of the United States of America, this communication was reasonably viewed as a threat of prosecution by the nation's highest law enforcement authority. For example, Time, Inc. responded by objecting to the "serious accusation" by the "U.S. Department of Justice" and Kable News Company noted that the letter unfairly creates the impression of a "criminal complaint or charge filed," citing the protections of the Sixth Amendment.

Despite years of uninterrupted sales of petitioner's magazines, the Meese Commission's letter and threat of a blacklist caused numerous retail chains across the nation to precipitously drop *Penthouse* magazine, resulting in a drastic and continuing loss of sales revenues amounting to millions of dollars. Their fear of official action remains unabated due to the failure of the judicial system to denounce the Meese Commission's conduct as unconstitutional or to reaffirm the clearly established law intended to prevent this brand of governmental suppression.

Petitioner commenced this action in the United States District Court for the Southern District of New York on May 15, 1986, and on June 2, 1986, upon motion of the respondents, it was transferred to the United States District Court for the District of Columbia, where a similar lawsuit had been commenced by Playboy Enterprises, Inc.

On July 3, 1986, the district court granted Playboy a preliminary injunction, finding that "[t]he letter exceeded the objectives and scope of the Commission," "it seems more than ironic that many of the decisions not to sell were made *after the Commission's letters were sent out*" (emphasis in original) and "for at least some of the distributors, the concern over having their names published in the Commis-

sion report compelled them to withdraw the sale and distribution of some of plaintiff's magazines and books." *Playboy Enterprises, Inc. v. Meese,* 639 F. Supp. 581, 585, 587, 588 (D.D.C. 1986).[3] The district court stayed all discovery and consolidated petitioner's case with the Playboy action for purposes of summary judgment. Then, four years after it had issued a preliminary injunction, the district court granted summary judgment dismissing the case in its entirety. *Playboy Enterprises, Inc. v. Meese,* 746 F. Supp. 154 (D.D.C. 1990).

Despite the Meese Commission's explicit threat to publish a blacklist and implicit threat of criminal prosecution, despite the overwhelming response withdrawing petitioner's constitutionally protected publications from sale, and despite the unrefuted allegations that the Commission sought to intimidate the Southland Corporation by outright deceit, the Court of Appeals affirmed summary judgment based on the qualified immunity privilege, reasoning that the Commission's conduct was mere "criticism" which did not "threaten[] anyone's First Amendment rights" (9a). In reaching this conclusion, the Court of Appeals failed to recognize that the line separating mere "criticism" from informal censorship was crossed in this case by the threat of a blacklist from the Department of Justice.[4]

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[3]The letter of "withdrawal" ordered by the district court had absolutely no impact on reinstating *Penthouse* magazine in any of the stores which had discontinued its sale as a result of the February 1986 letter.

[4]The question posed by the Court of Appeals suggests its own answer: "the scope of the government's right to speak where the exercise of that right has the effect of informal censorship, chilling constitutionally-protected speech" (16a-17a). Although the court below characterized that question as "a constitutional issue of first impression" (16a), it recognized the inescapable conflict of its holding with established constitutional precedent when it amended its opinion to substitute "discourages" (20a) for the reference to "informal censorship, chilling constitutionally-protected speech".

REASONS FOR GRANTING THE WRIT

I.

The decision below renders government officials immune from a damages suit when they exercise their coercive power to achieve censorship and suppression.

The decision below is a radical departure from well settled constitutional principles prohibiting governmental suppression by the use of intimidation and coercion. Permitting government officials to censor speech with which they disagree poses a grave threat to the First Amendment. Thus, "the Government's ability to impose content-based burdens on speech raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. New York State Crime Victims Board*, ___ U.S. ___, 60 U.S.L.W. 4029, 4032 (Dec. 10, 1991). The conduct of the respondents in this case cannot be disguised as mere "criticism" or efforts to "embarrass" (8a-9a) when they intentionally used the coercive power of their official status to achieve the goals of suppression and restraint of speech they did not like or they did not think to be in the best interests of America.

Since the decision in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), courts have been vigilant to protect against informal government censorship of speech. See, e.g., *Council for Periodical Distributors Ass'n v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd*, 827 F.2d 1483 (11th Cir. 1987); *Drive In Theatres, Inc. v. Huskey*, 435 F.2d 228 (4th Cir. 1970); *ACLU v. City of Pittsburgh*, 586 F. Supp. 417 (W.D. Pa. 1984). The longstanding philosophy behind *Bantam Books* and its progeny is that constitutional freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S.

516, 523 (1960). "What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Illinois*, ____ U.S. ____, 110 S.Ct. 2729, 2739 (1990).

The decision below reflects an improvident retreat from that position, essentially undermining the philosophy behind *Bantam Books* and in one fell swoop, under the guise of government "criticism," completely erasing the prohibition against government blacklists of constitutionally protected material. This is not a case of mere criticism of "ideas" or "the speech's content," *Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir. 1986), but rather the wholesale censorship of the speech itself by threatening to blacklist.[5]

The court below believed that "these officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the statutory or even constitutional authority to regulate" (8a). But this is precisely the vice this Court found unconstitutional in *Bantam Books*. Petitioner's material falls outside of the regulations of the obscenity laws, yet the Meese Commission determined to suppress these publications by means of informal censorship, therefore sidestepping all of the legal rights, protections and defenses that would otherwise be available in an obscenity prosecution. To paraphrase this Court's ruling in *Bantam Books*, "[i]t would be naive to credit the . . . assertion that these black-

[5]Although the court below relied upon *Block v. Meese*, that case was decided in June 1986 and therefore can have no bearing on the objective reasonableness of the respondents' conduct in February 1986. The relevant question is whether the law was clearly established "at the time an action occurred." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

lists are in the nature of mere" criticism, "when they plainly serve as instruments of regulation independent of the laws against obscenity." 372 U.S. at 68-69.

By failing to draw the line between criticism and suppression, the court below endorsed the use of governmental coercive power to effect a prior administrative restraint. As Justice Scalia observed in *Block v. Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986):

> The line of permissibility, we think, falls not between criticism of ideas in general and criticism of the ideas contained in specific books or expressed by specific persons; but rather between the disparagement of ideas (general or specific) and the suppression of ideas through the exercise or threat of state power. If the latter is rigorously proscribed, *see Bantam Books, Inc. v. Sullivan*, 372 U.S. at 72, 83 S.Ct. at 640, the former can hold no terror.

Given the blatant threat to blacklist distributors of petitioner's constitutionally protected magazines, the conclusion by the Court of Appeals that no "clearly established" rights were violated for purposes of the qualified immunity defense (10a) is incongruous. It is also unconstitutional "[i]n a society that abhors censorship." *Rust v. Sullivan*, ___ U.S. ___, 111 S.Ct. 1759, 1788 (1991) (Stevens, J., dissenting). The Commission's use of threats and intimidation amounts to "raw censorship based on content, censorship forbidden by the text of the First Amendment and well-settled principles protecting speech and the press." *Simon & Schuster, Inc. v. New York State Crime Victims Board*, ___ U.S. ___, 60 U.S.L.W. 4029, 4035 (Dec. 10, 1991) (Kennedy J., concurring).

The Court of Appeals, however, was not content to rest its holding on the finding that the law was not "clearly established," but pushed constitutional liberties over the precipice by concluding that government officials may even engage in conduct "designed, or intended, or motivated, to discourage the distribution of *Penthouse*" (12a). The undisputed evidence established that the Commission resorted to lies and deceit to advance its campaign of informal censorship, i.e., when an unidentified Commission member falsely informed the Southland Corporation that the Commission would find a causal connection between magazines such as *Penthouse* and child abuse, and when it followed this with its letter threatening to blacklist distributors who did not cooperate by removing the magazines from sale.

But deliberate conduct which has the effect of suppressing speech is patently unconstitutional under clearly established law.[6] As Justice Scalia wrote in *Block v. Meese,* 793 F.2d 1303, 1311 (D.C. Cir. 1986), the First Amendment is violated when government officials set out " 'deliberately . . . to achieve the suppression' of the films by 'the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation,' *Bantam Books, Inc. v. Sullivan,* 372 U.S. at 67, 83 S.Ct. at 637." The Commission's threat to publish a blacklist is a classic example of "coercion, persuasion, and intimidation" and the overwhelming success of this threat remains unrefuted.[7] Accordingly, the

[6]Petitioner asserted a constitutional tort both in terms of objective unlawfulness and unconstitutional motive on the part of the respondents. *Siegert v. Gilley,* 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd on other grounds,* ____ U.S. ____, 111 S. Ct. 1789 (1991). Either alternative should have survived the motion for summary judgment.

[7]In a sworn affidavit, the Commission's Executive Director insisted that the Commission never even "contemplate[d]" publishing a blacklist of distributors of pornography—yet its February 1986 letter threatened to do just that in order to accomplish by intimidation what it could not achieve by lawful means.

effect of the decision below is to endorse the use of deceit by government officials to achieve unconstitutional goals. At the same time, it necessarily chills the rights of those who are unable to predict the consequences of failing to appease future public officials or commissions whose legitimate goals have been sabotaged by tactics of censorship and suppression.

By attacking petitioner's chain of distribution, the Commission focused its efforts at the vulnerable point of sale—which, if impaired, would fulfill Reverend Wildmon's prediction that "Penthouse would be seriously crippled financially." Intimidating distributors and retail outlets, however, is no less a First Amendment violation, for "[t]he freedom of expression protected by the First Amendment embraces not only freedom to communicate particular ideas, but also the right to communicate them effectively." *United States v. Eichman*, ____ U.S. ____, 110 S. Ct. 2404, 2412 (1990) (Stevens, J., dissenting); *Ex Parte Jackson*, 96 U.S. (6 Otto) 727, 733 (1877), ("Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.")

The invidious irony of this case is that petitioner was condemned and punished by means of informal censorship, yet the Commission's Final Report never once described *Penthouse* magazine as pornographic or obscene, never linked it to child abuse and never suggested that it is an unlawful or illegal publication.[8] At the press conference presenting the Commission's Final Report, the Chairman publicly stated that the Commission "was not designed to address what would be ordinarily mainstream material"

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[8]*None* of the issues of *Penthouse* magazine which were discontinued by national retail chains following the February 1986 missive or published subsequently has *ever* been found to be obscene or illegal.

and "did not focus its attention on mainstream publications such as Playboy and Penthouse." If those statements were truthful, then the Commission's February 1986 letter, the enclosure to which was primarily aimed at Penthouse and Playboy, was sent to achieve Reverend Wildmon's objective of suppressing the materials he and others deemed objectionable, rather than to further any legitimate work of the Commission. This conduct plainly exposes the respondents to an action for money damages under the *Bivens* doctrine. After all, "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald,* 457 U.S. 800, 814 (1982).

II.

The court below decided a constitutional question in a way that conflicts with this Court's prior decision in *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963).

The purported-distinction of *Bantam Books* by the Court of Appeals (6a-7a) constricts that landmark decision in such a way as to render it ineffective beyond its specific factual context. According to the court below, unless the government official communicates a specific and direct threat to prosecute followed by police visits, he is immune from a *Bivens* claim.[9] The Court of Appeals flatly rejected the argument that the threat to blacklist infringes "anyone's First Amendment rights" (9a). Were this the law, then the notices sent by the Rhode Island Commission to Encourage Morality in Youth, deeming certain books and magazines

[9]But courts have found constitutional violations even where the official conduct was unaccompanied by any threat of criminal prosecution. See, e.g., *Hammond v. Brown,* 323 F. Supp. 326 (N.D. Ohio), *aff'd,* 450 F.2d 480 (6th Cir. 1971); *Penthouse International, Ltd. v. Putka,* 436 F. Supp. 1220 (N.D. Ohio 1977); *Liverright v. Joint Comm. of the General Assembly of Tennessee,* 279 F. Supp. 205 (M.D. Tenn. 1968).

"objectionable" for sale or distribution, would have been legal.

The *Bantam Books* decision may not be applied so narrowly.[10] This Court has recognized the judicial responsibility "to look through forms to the substance" in order to conclude that informal censorship "may sufficiently inhibit the circulation of publications. . . ." 372 U.S. at 67. In *Bantam Books*, this Court concluded that the procedures of the Rhode Island Commission were "radically deficient" because "[t]hey fall far short of the constitutional requirements of governmental regulation of obscenity. We hold that the system of informal censorship . . . violates the Fourteenth Amendment." *Id.* at 71.[11]

So too in this case, the Meese Commission's threats to publish a blacklist of corporations who sell *Penthouse* magazine as distributors of pornography "fall far short of the constitutional requirements of governmental regulation of obscenity." Like a star chamber proceeding, the Meese Commission unilaterally condemned constitutionally protected material as "pornographic"[12] without any regard for the judicial safeguards and standards applicable to an obscenity determination. While such views can legitimately

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[10]Limiting the holding of *Bantam Books* to threats of prosecution ignores the availability of "other means of coercion, persuasion, and intimidation." *Block v. Meese*, 793 F.2d 1303, 1311 (D.C. Cir. 1986), quoting *Bantam Books*, 372 U.S. at 67.

[11]The Court of Appeals felt that *Bantam Books* was distinguishable because there "the Commission viewed its task as the *proscribing* of objectionable publications" (7a) (emphasis in original). But here the Meese Commission likewise believed that it had "both the right and the duty to condemn, in some cases, that which is constitutionally protected. . . ." Final Report at 300 n. 44.

[12]The Meese Commission's Final Report acknowledged that "[t]o call something 'pornographic', is plainly, in modern usage, to condemn it. . . ." Final Report at 228, and that "*governmental* condemnation may act effectively as governmental restraint," citing *Bantam Books*, Final Report at 300 n.442 (emphasis in original).

be expressed by private interest groups, when threats are undertaken by government officials expressing or implying use of their coercive power, that creates a scheme of unlawful suppression. See, e.g., *Hentoff-v. Ichord,* 318 F. Supp. 1175 (D.D.C. 1970).

In the *Bantam Books* case, "the direct and obviously intended result of the Commission's activities was to curtail the circulation in Rhode Island of books published by appellants." 372 U.S. at 64 n.6. For purposes of the summary judgment motion in this case, it was accepted as true that the purpose and effect of the Meese Commission's conduct was likewise to suppress the sale of *Penthouse* magazine. The principle behind *Bantam Books,* therefore, fully supports the claims asserted here.

Moreover, the case law cautions against a narrow reading of precedent in applying the qualified immunity privilege. The determination of "clearly established law" is not to be made "so narrowly as to require that there be *no* distinguishing facts between the instant case and existing precedent." *Hobson v. Wilson,* 737 F.2d 1, 26 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1084 (1985) (emphasis in original). Such a rule "would unquestionably turn qualified into absolute immunity by requiring immunity in any new fact situation." *Id.* Only "real and substantial" differences, not "trivial factual distinctions," can establish that a new case differs from existing precedent for purposes of good faith immunity. *Zweibon v. Mitchell,* 720 F.2d 162, 173 (D.C. Cir. 1983), *cert. denied,* 469 U.S. 880 (1984). As Justice Scalia noted in *Anderson v. Creighton,* 483 U.S. 635, 107 S. Ct. 3034, 3039 (1987), defining the contours of a clearly established right "is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." The question for decision is whether respondents' conduct transgressed a clearly established legal *principle,* given the information

they possessed at the time, not whether they invented a different or clever way to violate such a principle. *Hobson v. Wilson, supra,* 737 F.2d at 29.

By artificially distinguishing *Bantam* Books, the Court of Appeals has eroded the fundamental principle for which it stands, namely, prohibiting a system of prior administrative restraints by subtle and indirect means of coercion, persuasion and intimidation.

III.

The court below improperly extended qualified immunity to government officials who exceed the scope of their discretionary authority by using deceit to accomplish their ulterior goal of censorship and suppression.

As this Court held in *Harlow v. Fitzgerald,* 457 U.S. 800, 816, 818 (1982), only those government officials "performing discretionary functions" may be shielded from liability for civil damages—all others are without the benefit of this defense. *Zeigler v. Jackson,* 716 F.2d 847, 849 (11th Cir. 1983) ("In order to establish this good faith defense, a defendant must show that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred"); *Flinn v. Gordon,* 775 F.2d 1551, 1553 (11th Cir. 1985), *cert. denied,* 476 U.S. 1116 (1986); *Briggs v. Goodwin,* 569 F.2d 10, 15 (D.C. Cir. 1977), *cert. denied,* 437 U.S. 904 (1978) ("official immunity, whether absolute or qualified, extends only so far as the affected government official's authority"); *Cruz v. Beto,* 603 F.2d 1178, 1183 (5th Cir. 1979) (defendants bear the burden of establishing that their challenged actions "were taken in the regular course of discharging [their] official duties").

Petitioner alleged that Southland's decision to discontinue selling *Penthouse* magazine was influenced by a com-

munication from an unidentified Commission member who falsely told a Southland senior executive that the Commission intended to publish a finding linking magazines such as *Penthouse* to child abuse (4a-5a). Spreading false information for the purpose of influencing Southland to remove *Penthouse* from its company stores surely exceeded the Commission's limited mandate "to determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees" (2a). It would be irrational to hold that the use of lies and deceit by government officials is a legitimate exercise of their discretionary authority, entitling them to invoke the qualified immunity privilege. Yet that is precisely the effect of the decision below.[13]

The contact with Southland plainly constituted "manifestly *excessive* means" to accomplish any legitimate objective, and this sort of excessive conduct should not be cloaked with immunity. *McKinney v. Whitfield*, 736 F.2d 766, 770 (D.C. Cir. 1984) (emphasis in original). In the context of a summary judgment motion, petitioner's factual allegations must be regarded as true, so that the charge of *ultra vires* conduct cannot be resolved on a motion for summary judgment. *Detro v. Roemer*, 732 F. Supp. 673, 675 (E.D. La. 1990). At the very least, issues of fact were raised

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[13]In a statement attached to the order denying petitioner's motion for rehearing (22a), Circuit Judge Randolph indicated that petitioner did not link the improper telephone call with the argument that the Commission exceeded its authority. However, the specific factual allegations concerning the secret contact with Southland were raised throughout petitioner's briefs to the Court of Appeals, albeit not in the precise context of the Commission's discretionary authority. Nevertheless, the relevant facts and the constitutional issues involved were sufficiently raised below to preserve the argument here. Cf. *Cohen v. Cowles Media Co.*, ____ U.S. ____, 111 S. Ct. 2513, 2517 (1991).

as to this threshold question of whether the respondents acted beyond the scope of their discretionary authority, so as to deny summary judgment and proceed with discovery.

Conclusion

For these reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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December 20, 1991

APPENDIX

Opinion of the Court of Appeals for the District of Columbia Circuit, dated July 19, 1991

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 15, 1991 Decided July 19, 1991

No. 90-5181

PENTHOUSE INTERNATIONAL, LTD.,
APPELLANT

v.

EDWIN A. MEESE, III, ATTORNEY GENERAL
OF THE UNITED STATES, et al.

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 86-01515)

Jeffrey H. Daichman, with whom *Thomas V. Marino* was on the brief, for appellant. *Peter D. Isakoff* also entered an appearance for appellant.

John P. Schnitker, Attorney, Department of Justice, with whom *Stuart M. Gerson,* Assistant Attorney General, *Jay B. Stephens,* United States Attorney, *Leonard*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Schaitman and *Barbara L. Herwig,* Attorneys, Department of Justice, were on the brief, for appellees.

Before: SILBERMAN, WILLIAMS, and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

Concurring opinion filed by *Circuit Judge* RANDOLPH.

SILBERMAN, *Circuit Judge*: Appellant Penthouse International, Ltd. (Penthouse) brought this action against then Attorney General Edwin Meese, III and the members of the Attorney General's Commission on Pornography (Commission), seeking equitable and monetary relief for alleged violations of Penthouse's First Amendment rights. The district court granted appellees' motion for summary judgment, dismissing appellant's damages action as barred by qualified immunity and appellant's claims for declaratory and injunctive relief as moot. We affirm.

I.

Concerned with what he perceived as a serious problem of pornography in American society, President Reagan requested that the Attorney General establish a commission to study the matter and advise the Department of Justice as to appropriate remedies. The Attorney General, accordingly, created the Commission on Pornography in 1985, pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2 §§ 1-15, "to determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees." The Commission took testimony from some 200 witnesses at a series of six public hearings around the country, followed by a number of meetings, open to the public, at which Commission members reviewed the testimony, determined the contents, and discussed drafts of the Commission's final report.

One of the witnesses, Reverend Donald Wildmon, Executive Director of the National Federation of Decency, accused a number of well-known corporations of distributing pornography. Reverend Wildmon submitted a written statement entitled "Pornography in the Family Marketplace," setting forth his views about the role of corporations that were "household names" in selling pornographic films, television, and magazines. He asserted that the 7-Eleven national chain of convenience stores was "the leading retailer[ ]" of *Penthouse* and *Playboy,* which he termed "porn magazines," and predicted that the withdrawal of this major sales outlet would financially "cripple" both magazines. After discussion whether to include Reverend Wildmon's testimony in the report, the Commission decided to send a letter to the corporations named by Reverend Wildmon, asking for a response to the accusation. The letter, dated February 11, 1986, which was sent to 23 corporations, included a copy of Reverend Wildmon's testimony, but failed to identify him as its author. The letter stated:

> Authorized Representative:
>
> The Attorney General's Commission on Pornography has held six hearings across the United States during the past seven months on issues related to pornography. During the hearing in Los Angeles, in October 1985, the Commission received testimony alleging that your company is involved in the sale or distribution of pornography. The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final report section on identified distributors.
>
> You will find a copy of the relevant testimony enclosed herewith. Please review the allegations and advise the Commission on or before March 3, 1986, if you disagree with the statements enclosed. Failure to respond will necessarily be accepted as an indication of no objection.
>
> Please call Ms. Genny McSweeney, Attorney, at (202) 724-7837 if you have any questions.

Thank you for your assistance.

Truly yours,
s/Alan E. Sears

Alan E. Sears
Executive Director

enc.: Self-Addressed
Postage Paid Mailing Label

The response varied. Time Inc. called the "accusations" "outrageous" and chastised the Commission for relying on "uncorroborated, gratuitous statements" from unidentified sources in what it characterized as a "slipshod and misguided effort." Southland Corporation, owner of the 7-Eleven chain, on the other hand, wrote that since the corporation had decided to stop selling adult magazines in light of the public concern about the effects of pornography it "urge[d] that any references to Southland or 7-Eleven be deleted from [the Commission's] final report."

Southland's decision, Penthouse alleges, was influenced by a telephone call from one of the members of the Commission to the General Counsel and Vice President of Southland, John H. Rodgers.[1] Rodgers declined to identify the Commission member with whom he spoke, but alleged that he or she told him that the Commission believed that *Playboy* and similar magazines were linked to child abuse and the Commission intended to publish this finding in its report. Southland, which had been leading a national campaign to fight child abuse, believed that if the Commission published those views on the connection between magazines sold by Southland and child abuse, the resulting publicity would be embarrassing to Southland, whether or not there was in fact such a link. Penthouse alleges that the Commission member's information was false in two respects—the Commission had found no causal connection between *Playboy* or other such maga-

[1]Penthouse relies on the affirmation of Bruce Ennis, counsel for Playboy, made in opposition to the grant of summary judgment in the Playboy litigation, in support of these allegations.

zines and child abuse, and it had no intention of discussing any such link in its report. Penthouse also claims that the Commission member deliberately spread these allegedly false allegations to Southland with the intention of inducing the company to withdraw as a distributor of *Penthouse*.

Playboy Enterprises, Inc. and Penthouse sought a preliminary injunction against publication of any "blacklist" of corporations which distributed their respective publications and an order withdrawing the Commission's letter, as well as other relief, including a statement from the Commission that it did *not* view their magazines as obscene. The district court granted preliminary relief. *See Playboy Enters. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986). The court determined that Playboy had shown that it was likely to prevail on the merits in establishing that the Commission's actions amounted to an informal scheme of government censorship constituting a prior administrative restraint. The court therefore granted a preliminary injunction, requiring the Commission to send a follow-up letter to the named corporations, withdrawing the first letter and stating that no reply to it would be necessary as the Commission had already decided that no corporations would be named in the final report. The Commission complied. The court refused, however, to be drawn further into the dispute—by considering whether or not the publications were obscene or pornographic or preventing the Commission from doing so—and therefore refused further injunctive relief.

The two publications persisted in their claims for permanent injunctive and declaratory relief, as well as with a *Bivens* claim for damages, *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Defendants at that point moved for summary judgment asserting the claims for equitable relief were moot and that the damages claim was barred by the doctrine of good faith or qualified immunity because the Commission's action did not violate any clearly-established First Amendment right. Plaintiffs contended that defendants'

conduct is unconstitutional under the principle established in *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963), and alternatively argued that summary judgment was improper before plaintiffs had the opportunity for discovery regarding defendants' allegedly "unconstitutional motives," to demonstrate that defendants acted with the intent to violate plaintiffs' constitutional rights. Discovery was also necessary, in plaintiffs' view, to resolve the material dispute as to the continuing harm from defendants' letter. The district court granted summary judgment to defendants on all grounds. Penthouse alone appeals the judgment.

II.

Appellant, of course, wishes a determination from the judiciary that the government's conduct was unlawful. Such an opinion, appellant believes, will enable it to persuade retailers who have discontinued selling *Penthouse* to change their minds, and prevent a similar effort in the future which might threaten appellant's circulation. Appellant's primary claim, designed to gain such a determination, is its *Bivens* claim for damages. It is asserted that the Commission sought to prevent ("chill") the distribution of constitutionally protected speech and thereby violated appellant's First Amendment rights. The government has no right to prohibit adult pornography that does not qualify as obscenity, and, in any event, the government may not impose a prior restraint on the distribution even of arguably obscene materials.

Penthouse, as we mentioned, relies on *Bantam Books* to support its claim. In that case, however, the Rhode Island Commission to Encourage Morality in Youth had the authority "to investigate and *recommend the prosecution* of all violations" of state statute. 372 U.S. at 60 n.1 (emphasis added). The notices sent by the Rhode Island Commission specifically stated that the Commission was charged by the state legislature with "prevent[ing] the sale, distribution or display of indecent and obscene

publications," and that copies of the lists of "objectionable" publications were being circulated to "Chiefs of Police" "with the order that they are not to be sold, distributed or displayed to youths under eighteen years of age." *Id.* at 62 n.5. Moreover, the notice informed the recipient that "[t]he Attorney General will act for us in case of non-compliance." *Id.* And the notice was followed by a police visit to the distributors targeted by the Rhode Island Commission. Because the Commission viewed its task as the *proscribing* of objectionable publications—it phrased its notices as orders and followed them up by police visits —the Court thought the plaintiff faced a genuine threat of prosecution and therefore the Commission's enforcement scheme amounted to a prior administrative restraint on publication. *Id.* at 67-72.

In our case, the Advisory Commission had no equivalent tie to prosecutorial power nor authority to censor publications. The letter it sent contained no threat to prosecute, nor intimation of intent to proscribe the distribution of the publications. Penthouse argues that since the letter was written on Justice Department stationery, used the term "allegations," and contained an instruction to contact an attorney for further information, recipients would reasonably think they were threatened with prosecution—particularly in light of the potential confusion between the terms pornography and obscenity. Indeed, as Penthouse points out, several recipients responded by denying they had engaged in unlawful conduct. It may well be that the Commission came close to implying more authority than it either had or explicitly claimed. Nevertheless—any misapprehensions of recipients notwithstanding—we do not believe that the Commission ever threatened to use the coercive power of the state against recipients of the letter. *Cf. Meese v. Keene,* 481 U.S. 465, 484 (1987) (recipient's perception of the negative connotations of the government's use of a term does not itself cause the government's speech to amount to censorship). And the Supreme Court has never found a government abridgement of First Amendment rights in the

absence of some actual or threatened imposition of governmental power or sanction. *See id.* at 480-83 (1987); *Laird v. Tatum,* 408 U.S. 1, 11 (1972) (First Amendment violations found when "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature"); *see also Lamont v. Postmaster General,* 381 U.S. 301, 305 (1965).[2]

Appellant, employing a number of forceful verbs and adjectives, would have us extend *Bantam Books.* It is argued that the Commission's action "chilled," "intimidated," "condemned," and "censored" distribution of *Penthouse*; the very fact that the 7-Eleven chain discontinued sa... of *Penthouse* proves that the Commission's actions abridged appellant's First Amendment rights. That argument seems to us to stretch too far. We do not see why government officials may not vigorously criticize a publication for any reason they wish. As part of the duties of their office, these officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the statutory or even constitutional authority to regulate. *Cf. Reuber v. United States,* 750 F.2d 1039, 1059 (D.C. Cir. 1984) (a government actor may openly criticize a study produced by an employee so long as no job-threatening sanction is employed). If the First Amendment were thought to be violated any time a private citizen's speech or writings were criticized by a government official, those officials might be virtually immobilized. *See Block v. Meese,* 793 F.2d 1303, 1312-1314 (D.C. Cir. 1986) (Scalia,

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[2]Appellant also relies on *NAACP v. Alabama,* 357 U.S. 449, 463 (1958), as forbidding "blacklisting" distributors of appellant's magazine. But *NAACP v. Alabama* implicated a separate interest —that against compelled disclosure as an infringement of the First Amendment guarantee of privacy of association and belief— which appellant does not allege to be at issue in this case. Since there is no contention that the anonymity of the distributors of appellant's magazine is at stake (nor do we see how it could be), the line of associational cases is simply inapposite. *Cf. Uphaus v. Wyman,* 360 U.S. 72, 81 (1959) (where list is already publicly available, First Amendment privacy interest is slight).

J.); *cf. Barr v. Mateo,* 360 U.S. 564, 574-75 (1959); *see generally* M. Yudof, *When Government Speaks,* 20-22, 31, 38-44, 55-56, 164-73, 200-07, 259-99 (1983); T. Emerson, *The System of Freedom of Expression,* 698-99, 701-09 (1970).

Whenever a government official criticizes a publication it might be thought that he or she implicitly appeals to the public not to buy, or distributors not to sell, that publication. And if the distributor refuses the appeal and the government official criticizes the distributor for its refusal, it is hard to understand how, and why, that criticism can be banned. The letter, of course, did not go so far as to express the government's (or even the Advisory Commission's) criticism of the companies selling *Penthouse.* But even accepting Penthouse's argument that the letter could be fairly read as a threat to "blacklist" its distributors, this charge with the rhetoric drawn out says nothing more than that the Commission threatened to embarrass the distributors publicly. As we have observed, corporations and other institutions are criticized by government officials for all sorts of conduct that might well be perfectly legal, including speech protected by the First Amendment. At least when the government threatens no sanction—criminal or otherwise—we very much doubt that the government's criticism or effort to embarrass the distributor threatens anyone's First Amendment rights.[3] "[W]e know of no case in which the first amendment has been held to be implicated by governmental action consisting of no more than governmental criticism of the speech's content." *Block v. Meese,* 793 F.2d at 1313.

In any event, it is unnecessary to decide whether a government official's appeal to a distributor not to sell a particular publication, backed by no more than a "threat" by the official to characterize the publications with a strong pejorative, could, under any circumstances, violate the First Amendment. Even if it could, and even if the facts

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[3]There is no contention that the threat to blacklist the distributors violated their due process rights. *Cf. Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123 (1951).

of this case were to make out such a cause of action, certainly no court has ever so held. To be sure, in *Hobson v. Wilson* we held that the extensive scheme developed by the FBI to disrupt political activities of certain disfavored groups (COINTELPRO) violated their First Amendment rights of association and speech, 737 F.2d 1, 28 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). In that case, however, FBI agents acted surreptitiously and in disguise to publish pamphlets making false allegations about persons in the target organizations. The government officers were not openly criticizing anyone or any idea; indeed, they were acting as agents provocateurs without disclosing that the government was involved at all. We see *Hobson*, then, as an exception to the general rule we glean from Supreme Court cases, an exception limited to a situation where the government's interest in having its officials able to communicate freely on all sorts of matters is not implicated. That exception does not apply here because there is no allegation that a Commission member said or did anything while purporting to be other than a Commission member. That Southland's general counsel did not identify *which* Commission member made the alleged call seems quite irrelevant. Some of the broad dicta in *Hobson* used in identifying the contours of the constitutional right involved appears to us to have been overtaken and circumscribed by the subsequent Supreme Court case of *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987), which cautioned against describing the asserted constitutional right in overly general terms. In sum, appellees are entitled to immunity from suit for damages for a constitutional tort because "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly* established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (emphasis added); *see also Harris v. District of Columbia*, No. 90-5281, slip op. at 5-6 (D.C. Cir. 1991).

For that same reason, appellant's procedural argument —that summary judgment was improperly granted

against it before it had an opportunity to pursue discovery concerning the Commission's intent—also fails. Assuming *arguendo* that appellant could show that the Commission members and staff, and even Justice Department employees, deliberately set out to so embarrass or intimidate all Penthouse's distributors to bring about a substantial reduction in the magazine's circulation, we do not see how appellant can recover damages—so long as these officials took no covert, disruptive action, but identified themselves and their speech. Even with those additional facts, it cannot reasonably be said that appellant had a *clearly* established constitutional right to be free of such deliberate and calculated pressure if no threats of legal sanctions were employed. Appellant's reliance on *Hobson* to argue that if the government's motive is to "counter the influence of the target associations," 737 F.2d at 27, there is an "additional basis of liability . . . regardless of whether the law was clearly established," Appellant Br. at 41, is unavailing. Discovery into motive is permissible only when the alleged substantial constitutional violation "turns on an unconstitutional motive," *Siegert v. Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd on other grounds*, _ U.S. _, 59 U.S.L.W. 4465 (U.S. May 23, 1991). By "turning" on motive, we understand *Hobson* to mean that the alleged conduct, like a discharge of a government employee who was a minority, is not of constitutional concern—indeed it might not even be blameworthy—unless it is alleged that a government official fired the employee because of the employee's minority status. In other words, the act and motive are analytically quite separate and it is only when both coalesce that a constitutional tort occurs. And the motive is not expressed in terms of interference with someone's "constitutional right," which is much too general and vague but rather a more particular motive like firing someone because of his or her skin color which, when combined with the act, as a matter of law constitutes an interference with a constitutional right. Here, by contrast, the government's "motive" is not analytically a separate factor. Nor could

it be. One must assume, as we have indicated above, that the government's speech was designed, or intended, or motivated, to discourage the distribution of *Penthouse*. The actor always can be thought to intend the natural consequences of his act. To ask, therefore, whether the government intended to interfere with appellant's free speech or First Amendment protected interests is to beg the question because all depends on how one defines the First Amendment protected interest. The proper question is whether the appellant enjoys a constitutional right to be free of government criticism that would discourage the distribution of its magazine. If it does not—or at least if the right is not clearly established—the government's motive is irrelevant.

Nor do we believe that the truth or falsity of the statements included in the Commissioner's alleged phone call to Southland's general counsel is a basis for a constitutional tort. One of the purported assertions—that pornography causes child abuse—is not the kind of statement that appears susceptible to a true/false evaluation, and the second—that the Commission would make such a link in its report—appears to be only a prediction. In any event, we very much doubt that a *constitutional* line could or should be drawn between "true" government speech that impacts on the publications or speech of private citizens and "false" government speech of that character.

Appellant also contends that the members of the Commission are not entitled to immunity because the letter suggesting that the Commission might publish a list of distributors in its final report was outside their legitimate investigative mandate. We think this argument without merit. The Commission's charter, which defined the scope of the Commission's inquiry, called for the Commission to make "an examination of the means of production and distribution of pornographic materials" and "the recommendation of possible roles and initiatives that the Department of Justice and agencies of local, State, and Federal government could pursue in controlling, consistent with constitutional guarantees, the production and

distribution of pornography." Given this charter, it could hardly be said that a letter inquiring (however clumsily) into the distribution of pornography is " 'manifestly or palpably beyond the authority [of the Commission].' " *Briggs v. Goodwin,* 569 F.2d 10, 16 (D.C. Cir. 1977), *cert. denied,* 437 U.S. 904 (1978) (quoting *Spaulding v. Vilas,* 161 U.S. 483, 498 (1896)).

III.

Although Penthouse does not appeal the district court's holding that its claim for a permanent injunction is moot because Penthouse cannot show that it will ever "again be subject to the alleged illegality," *City of Los Angeles v. Lyons,* 461 U.S. 95, 109 (1983), it nevertheless renews its request for a declaratory judgment. Article III case or controversy requirements apply as forcefully, of course, to relief sought under the Declaratory Judgment Act as to any other form of relief. *Golden v. Zwickler,* 394 U.S. 103, 108 (1969). The question for us, then, is whether at the time relief is sought " 'the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.*' " *Preiser v. Newkirk,* 422 U.S. 395, 402 (1975) (emphasis by the Court) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941)).

The district court's issuance of a temporary injunction sufficiently responded to the injury for which Penthouse sought equitable relief in its original complaint to raise a real question whether any dispute still remains for the court to adjudicate. When a litigant has already received relief for the injury complained of, no live controversy remains. *See Save Our Cumberland Mountains v. Clark,* 725 F.2d 1422, 1432 (D.C. Cir. 1984). To be sure, the district court's preliminary injunction issued only on behalf of Playboy International Enterprises, and did not specifically refer to Penthouse because Penthouse chose to seek

discovery and therefore refused consolidation with Playboy's suit. Penthouse, nevertheless, obtained the equitable relief it was seeking—the letter to which it objected was withdrawn and the Commission's *final* report was published without listing the distributors of appellant's magazine as "distributors of pornography."

Penthouse relies on *County of Los Angeles v. Davis*, 440 U.S. 625 (1979), to support its argument that the controversy is still alive. *County of Los Angeles* held that a case is moot only when "(1) it can be said with assurance that 'there is no reasonable expectation . . . ' that the alleged violation will recur . . . and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation," *id.* at 631 (citations omitted). Since the Commission's dissolution ensures that the violation will not recur, Penthouse rests its argument against mootness on the second part of the test. It asserts that it continues to suffer "considerable reputational and financial injury," because distributors who dropped its magazine in response to the Commission's letter are still refusing to carry the magazine, despite the retraction of the letter by the Commission. Penthouse argues that a declaratory judgment that the Commission's action violated Penthouse's First Amendment rights will mitigate this continuing harmful effect by "help[ing to] allay the concerns of distributors who fear that association with plaintiff's publication may subject them to governmental condemnation or possibly even prosecution."

We are skeptical whether this claimed continuing injury is adequate to keep the controversy alive under *County of Los Angeles*. In all the cases in which this court, (in line with Supreme Court precedent, *see, e.g., Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984)), has found that the effects of an alleged injury were not eradicated, some tangible, concrete effect, traceable to the injury, and curable by the relief demanded, clearly remained. For example, in *Reeve Aleutian Airways v. United States*, 889 F.2d 1139, 1143 (D.C. Cir. 1989), the reputational injury was a direct effect of the legal action

the government had taken in suspending the company from participating in Department of Defense contracts. Even though the suspension had been lifted, it remained on the books as evidencing a violation of air safety standards, causing a drop in the company's business. In *American Fed. of Gov't Employees v. Reagan,* 870 F.2d 723, 726 (D.C. Cir. 1989), although a newly-issued executive order had superseded the allegedly defective original order, "[i]mportant collateral consequences flowing from the [original] order" kept the controversy alive. There remained an unfair labor practice suit regarding the action the union had taken in unilaterally dropping the parties affected by the original order from membership as a direct response to that original order. And in *Doe v. United States Air Force,* 812 F.2d 738, 740-41 (D.C. Cir. 1987), the effect of the government's allegedly illegal search was not completely eradicated because the government retained a copy of the records seized, even though it did not intend to use them, and a declaratory judgment would afford the tangible relief of the return of the disputed documents. The continuing harm of which Penthouse complains appears to fall short of this type of showing. Penthouse claims that distributors are fearful of prosecution for carrying the magazine. While a controversy is not moot so long as a real danger of prosecution remains, a mere speculative or remote chance of legal action will not suffice. *Clarke v. United States,* 915 F.2d 699, 701-02 (D.C. Cir. 1990) (en banc).

Nor is the claim that distributors fear future government condemnation less speculative. Even if we assume that the Commission's letter was intended to show its disapproval of distributors of pornography (including distributors of *Penthouse* magazine), Penthouse offers no evidence that *any* governmental body continues to wage a campaign to discourage its distributors. So there is no ongoing threat that can account for the distributors' alleged fear of government disapproval. As to the argument that the distributors' fear is a continuing effect of the Commission's original action, Penthouse offers no rea-

son why, if the retraction of the letter and the demise of the Commission itself failed to persuade distributors to return once again to the Penthouse fold, a declaratory judgment would be likely to do so. Appellant has not shown, therefore, that even were it to prevail on the merits, the declaratory relief which it now seeks would actually redress the reputational and business injuries from which it claims to be suffering. It seems highly speculative that any action short of requiring the distributors to carry *Penthouse* would give appellant relief.

Even assuming that there is some trace of a continuing injury sufficient to satisfy Article III, we still must determine whether declaratory relief would be appropriate as an exercise of the court's discretionary, equitable powers. Where it is so unlikely that the court's grant of declaratory judgment will actually relieve the injury, the doctrine of prudential mootness—a facet of equity—comes into play. This concept is concerned, not with the court's power under Article III to provide relief, but with the court's discretion in exercising that power. *See Chamber of Commerce v. United States Dep't of Energy,* 627 F.2d 289, 291 (D.C. Cir. 1980). Declaratory relief, like other forms of equitable relief, is discretionary. *A.L. Mechling Barge Lines v. United States,* 368 U.S. 324, 342 (1961). The Declaratory Judgment Act states only that a court "*may* declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201 (1988) (emphasis added). Where it is uncertain that declaratory relief will benefit the party alleging injury, the court will normally refrain from exercising its equitable powers. *See In re AOV Indus.,* 792 F.2d 1140, 1147-48 (D.C. Cir. 1986); *Spivey v. Barry,* 665 F.2d 1222, 1235 (D.C. Cir. 1981). *See also Eccles v. Peoples Bank,* 333 U.S. 426, 431 (1948). This is especially true where the court can avoid the premature adjudication of constitutional issues. *See Community for Creative Non-Violence v. Hess,* 745 F.2d 697, 701 (D.C. Cir. 1984). Here we are faced with a constitutional issue of first impression—the scope of the government's right to speak where the exercise of that

right has the effect of informal censorship, chilling constitutionally-protected speech. The Supreme Court has signalled its reluctance to decide this very question, *see Meese v. Keene,* 481 U.S. at 484, while pointing to the troubling implications of limiting the government's free speech rights, *see id.* at 484 n.18. We should wait to decide this issue until it is squarely presented. We therefore affirm the district court's denial of Penthouse's request for a declaratory judgment.

* * * *

For the foregoing reasons, the district court's grant of summary judgment is affirmed.

It is so ordered.

RANDOLPH, *Circuit Judge, concurring*: I join in part III of the court's opinion affirming the district court's denial of declaratory relief, but concur only in the court's judgment that defendants are immune from liability. Plaintiffs have alleged that one Commissioner, in a telephone call to an official of Southland Corporation, conveyed a false statement about the Commission's findings for the purpose of inducing Southland to stop distributing *Penthouse* magazine. Although part II of the court's opinion suggests otherwise, I believe the First Amendment may well prohibit government officials from spreading false, derogatory information in order to interfere with a publisher's distribution of protected material. While this might require an inquiry into the official's motive, it is not unusual for a First Amendment violation to turn on whether governmental conduct was undertaken for the purpose of infringing on someone's speech. *See Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1974). I also do not think there would be any particular difficulty in drawing a line between cases in which an official has spoken the truth or perhaps made an inadvertent misstatement (*cf. Babbitt v. United Farm Workers*, 442 U.S. 289, 301 (1979)) and cases in which the official has engaged in intentional lying in order to bring about the injury. A ruling along these lines would, however, constitute new law. Like the majority, I cannot find any clearly established doctrine that the sort of governmental interference alleged here, which is analogous to the common law tort of "injurious falsehood" or malicious interference with a contractual relationship (*see* 2 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS 297 (1986); RESTATEMENT (SECOND) OF TORTS § 767 (1979)), violates the First Amendment. I therefore concur in the judgment that the defendants are immune from liability under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Order of the Court of Appeals for the District of Columbia Circuit, filed August 27, 1991, Amending the Prior Opinion of the Court

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5181 September Term, 1990

PENTHOUSE INTERNATIONAL, LTD.

Appellant

v.

EDWIN A. MEESE, III, Attorney General of the United States, *et al.*

Before: SILBERMAN, WILLIAMS and RANDOLPH, Circuit Judges

ORDER

On consideration of Appellant's Petition for Rehearing, it is

ORDERED, by the Court, that the Opinion for the Court filed by Circuit Judge Silberman on July 19, 1991 be, and hereby is, amended as follows:

Page 16, third line from the bottom, delete the entire sentence beginning: "Here we are faced with . . . ." Insert in lieu thereof: "Here we are faced with a constitutional issue of first impression—the scope of the government's right to speak where the government's speech discourages the constitutionally-protected speech of private citizens."

Per Curiam
For the Court:
Constance L. Dupre, Clerk

By: ROBERT A. BONNER
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit
FILED AUG 27 1991
CONSTANCE L. DUPRE
CLERK

Orders of the Court of Appeals for the District of Columbia Circuit, filed September 24, 1991, denying petition for rehearing and suggestion for rehearing *en banc*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5181 September Term, 1991

CA 86-1515

PENTHOUSE INTERNATIONAL, LTD.

Appellant

v.

EDWIN A. MEESE, III, Attorney General of the United States, *et al.*

BEFORE: Silberman, Williams and Randolph, Circuit Judges

ORDER

Upon consideration of Appellant's Petition for Rehearing, filed August 19, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: Robert A. Bonner
Deputy Clerk

A statement of Circuit Judge Randolph is attached.

In its petition for rehearing, Penthouse argues that the alleged telephone call to a Southland Corporation official exceeded the scope of the Commission's authority; therefore, the Commissioner who supposedly made it could not defend on the ground of immunity regardless of whether the law establishing liability was clear at the time. The issue is new. In its briefs, Penthouse did not make such an argument with respect to the telephone call. I therefore vote to deny the petition for rehearing.

United States Court of Appeals
For the District of Columbia Circuit
FILED SEP 24 1991
CONSTANCE L. DUPRE
CLERK

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5181 September Term, 1991

CA 86-1515

PENTHOUSE INTERNATIONAL, LTD.

Appellant

v.

EDWIN A. MEESE, III, Attorney General of the United States, *et al.*

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

ORDER

Appellant's Suggestion for Rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: Robert A. Bonner
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit
FILED SEP 24 1991
CONSTANCE L. DUPRE
CLERK

(2)

No. 91-1040

IN THE

Supreme Court of the United States

October Term, 1991

PENTHOUSE INTERNATIONAL, LTD.,

Petitioner,

against

EDWIN MEESE III, Attorney General of the United States, HENRY E. HUDSON, DR. JUDITH VERONICA BECKER, DIANE D. CUSACK, PARK ELLIOTT DIETZ, JAMES C. DOBSON, EDWARD J. GARCIA, ELLEN LEVINE, HAROLD (TEX) LEZAR, REV. BRUCE RITTER, FREDERICK SCHAUER and DEANNE TILTON-DURFEE, Members of the Attorney General's Commission on Pornography, and ALAN EDWARD SEARS, Executive Director of the Attorney General's Commission on Pornography,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Supplement to Appendix to Petition for a Writ of Certiorari

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(7326—LC5-340—1992)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PLAYBOY ENTERPRISES, INC., *et al.*,

Plaintiffs,

v.

EDWIN MEESE III, *et al.*,

Defendants.

Civil Action No. 86-1346 JGP

PENTHOUSE INTERNATIONAL, LTD.,

Plaintiff,

v.

EDWIN MEESE III, *et al.*,

Defendants.

Civil Action No. 86-1515 JGP

PLAYGIRL, INC.,

Plaintiff,

v.

EDWIN MEESE III, *et al.*,

Defendants.

Civil Action No. 86-1668 JGP

Order

These cases, which were consolidated for the purposes of the pending motions, come before the Court on the Motions For Summary Judgment filed on behalf of the defendants. After giving careful consideration to the motions, the opposition thereto, and the record in this case, the Court concludes, for the reasons set forth in a Memorandum to be filed, that the motions should be granted and the cases dismissed with prejudice.

It is hereby

ORDERED that the defendants' motions for summary judgment filed in the above captioned cases are granted, and it is further ORDERED that these cases are dismissed with prejudice.

May 29, 1990

JOHN GARRETT PENN
United States District Judge

Filed
May 29 1990
Clerk, U.S. District Court
District of Columbia

MEMORANDUM

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PLAYBOY ENTERPRISES, INC., *et al.*,

Plaintiffs,

v.

EDWIN MEESE III, *et al.*,

Defendants.

Civil Action No. 86-1346 JGP

PENTHOUSE INTERNATIONAL, LTD.,

Plaintiff,

v.

EDWIN MEESE III, *et al.*,

Defendants.

Civil Action No. 86-1515 JGP

PLAYGIRL, INC.,

Plaintiff,

v.

EDWIN MEESE III, *et al.*,

Defendants.

Civil Action No. 86-1668 JGP

These actions, which are consolidated for the purpose of the pending motions, are now before the Court on the motions for summary judgment filed by the defendants. After giving careful consideration to the motions and the opposition thereto, the Court concludes that the motions should be granted and the cases dismissed with prejudice. *See* Order filed May 29, 1990.

I

The plaintiffs filed these actions in an effort to have the Court permanently enjoin the defendants, who at the time of filing were members of the Attorney General's Commission on Pornography (Commission), from publicly disseminating a "blacklist" or from taking other action for the purpose of censoring and suppressing the distribution of the magazines published by the plaintiffs. The plaintiffs also seek money damages against the members of the Commission as well as then Attorney General Edwin Meese III, the Public Printer and the Superintendent of Documents.

The background of this litigation and the contentions of the plaintiffs are fully set forth in this Court's Memorandum, in which it granted a preliminary injunction, and will not be restated here. *See Playboy Enterprises, Inc. v. Meese*, 639 F.Supp. 581 (D.D.C. 1986). Briefly stated, the Commission held a series of six public hearings in various cities across the country and heard from approximately 200 witnesses. One witness the Commission heard from was a Reverend Donald Wildmon, who was then the Executive Director of the National Federation of Decency. He testified that certain corporations were engaged in the sale of pornography which, in his view, included certain magazines published by the plaintiffs. He also submitted a written statement setting forth his views. *See* Playboy Motion for Preliminary Injunction Exhibit C. At a public meeting held in January 1986, the Commission discussed whether Wildmon's allegations should be included in the final report of the Commission. Some of the members expressed the view that before addressing the question of

whether Wildmon's testimony should be included in the report, the corporations named by Wildmon should be given an opportunity to respond. Defendants' Motion for Summary Judgment, Appendix (Appendix) 2B. Eventually, it was decided to send a letter, hereinafter sometimes referred to as the "February letter," to each of those corporations. The letters sent were signed by the Chairman of the Commission and stated:

Authorized Representative:

> The Attorney General's Commission on Pornography has held six hearings across the United States during the past seven months on issues related to pornography. During the hearing in Los Angles, in October 1985, the Commission received testimony alleging that your company is involved in the sale or distribution of pornography. The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final report section on identified distributors.
>
> You will find a copy of the relevant testimony enclosed herewith. Please review the allegations and advise the Commission on or before March 3, 1986, if you disagree with the statements enclosed. Failure to respond will necessarily be accepted as an indication of no objections.
>
> Please call Ms. Genny McSweeney, Attorney, at (202) 724-7837 if you have any questions.
>
> Thank you for your assistance.
>
> Truly yours
> s/ Alan E. Sears
> Alan E. Sears
> Executive Director
>
> enc: Self Addressed
> Postage Paid Mailing Label

Appendix 2C.

The Court, drawing on the decision in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631 (1963), granted the motion for a preliminary injunction and directed the Commission to send a second letter to each addressee of the above letter to advise them that the letter had been withdrawn and that a reply to the letter was not required. In addition, the letter was to advise the corporations that their names would not be included in a final report. The Court did not enjoin the publication of the final report and shortly thereafter, the commission published a final report without naming any of the corporations and without any reference to the controversy between the parties. *See* Attorney General's Commission on Pornography, Final Report, July 1986.

The case now comes before the Court or the defendants' motions for summary judgment. First, the defendants contend that the request for permanent injunctive relief and for declaratory judgment is moot and further, that the plaintiffs have failed to state a claim for permanent equitable relief. Defendants also contend that the granting of a permanent injunction would violate the First Amendment rights of the defendants. Finally, in this connection, the defendants request that the preliminary injunction previously issued by the Court should be vacated. Second, the defendants argue that former Attorney General Meese, the Public Printer, and the Superintendent of Documents were improperly named as parties to this action. Third, the defendants contend that the claims for damages against the defendant Commission members should be dismissed because the members of the Commission were private citizens, not government employees. In the alternative, the defendants contend that they are immune from liability because the law was not clearly established. Finally, the defendants argue that special factors militate in favor of granting them immunity.

The plaintiffs oppose the motions for summary judgment First they contend that the defendants have violated clearly established federal law in that they have violated the First Amendment by taking informal action to suppress constitutionally protected speech. Plaintiffs also contend, in this regard, that the case presents factual issues and that the plaintiffs need discovery to obtain further evidence of defendants' "unconstitutional motives" and to demonstrate that the defendants knew that they were violating and intended to violate plaintiffs' rights. Second, the plaintiffs argue that the defendants are not entitled to summary judgment on plaintiffs' claims for further equitable relief. They state, for example, that there is a genuine issue of material fact as to whether the "injurious effects of the February 1986 letter have been completely and irrevocably eradicated." Third, the plaintiffs argue that the motions should be denied in view of pending discovery and that there are genuine issues of material fact as to whether defendants' conduct requires further equitable relief. Finally, the defendants contend that the defendants are not entitled to invoke the doctrine of qualified immunity.

II

At the request of President Reagan, the then Attorney General William French-Smith chartered the Commission on March 29, 1985, pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. I. The FACA provides in part:

> Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

5 U.S.C. App. I §9(b).

The Charter of the Commission provided the objectives and scope of the activity of the Committee as follows:

> The objectives of the Commission are to determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees.
>
> The scope of the Commission includes: a study of the dimensions of the problem of pornography, particularly visual and graphic pornography, including changes over the last several years in the nature of pornography, its volume, the impact of new technology, and pornography that relates to children; an examination of the means of production and distribution of pornographic materials, specifically including the role of organized crime in the pornography business; a review of the available empirical and scientific evidence on the relationship between exposure to pornographic materials and antisocial behavior, and on the impact of the creation and dissemination of both adult and child pornography upon children, including, as appropriate, the commissioning of new research on these subjects; a review of national, State, and local efforts, whether by the government or others, to curb pornography; and the exploration and, where appropriate, the recommendation of possible roles and initiatives that the Department of Justice and agencies of local, State and Federal government could pursue in controlling, consistent with constitutional guarantees, the production and distribution of pornography.

Appendix 2 A (Charter of the Commission, par. 2). It is from this point that the Court must consider the claims made by the plaintiffs and the defendants' motions.

First, the Court must agree with the defendants that the claim for injunctive relief is now moot, and has actually been moot since July 1986. Plaintiffs were understandably concerned that the February letter might amount to censorship and a prior administrative restraint in violation of the plaintiffs' First Amendment rights. The crucial part of the February letter referred to "testimony" alleging that the addressee corporation.was "involved in the sale or distribution of pornography." The Commission then went on to state that, "it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final report section on "identified distributors." The Commission then stated: "Failure to respond will necessarily be accepted as an indication of no objection." Presumably, the "no objection" referred to no objection to the corporation being "identified" as a distributor of pornography. *See* Appendix 2C. It must be borne in mind that the corporations receiving the letters included a number of drug store chains and convenience store chains which greatly prize their family business. There is no question but that the suggestion that such organizations might be distributors of pornography was sensitive. Moreover, the testimony referred to in the February letter was apparently the testimony of one person, the Reverend Wildmon. Thus, the corporations were placed in a position of having to respond to an inquiry from the commission or run the risk of having themselves identified with pornography. It is obvious that the matter was handled very poorly by the Commission, especially since the inquiry apparently represented the viewpoint of only one individual out of the approximately two hundred witnesses who were interviewed.

It was for the above reason that the Court granted, in part, the plaintiffs' motion for a preliminary injunction. The Court directed the defendants to withdraw the February letter and to

advise the recipients of those letters that they were not required to respond and that the corporations would not be named as distributors of pornography in the final report of the Commission. The Commission immediately complied with the Court's Order. A few days thereafter, the Commission's Final Report was published and there was no mention of a "black-list" of corporations.

The above facts make clear that the plaintiffs' request for injunctive relief and for declaratory relief is moot. It is unnecessary for the Court to go further to enter a permanent injunction because the Commission, which has gone out of existence pursuant to the terms of its charter, can no longer issue additional letters, and in fact, before going out of existence, the Commission published its *final* report.

Any suggestion that a permanent injunction should be entered notwithstanding the fact that the Commission has gone out of existence must also be rejected. Simply stated, the controversy here, as it relates to *this* Commission, is not capable of repetition. The statement of the Supreme Court that "Defunis will never again be required to run the gantlet (*sic*) of the Law School's admission process," applies with equal force here. *See DeFunis v. Odegaard,* 416 U.S. 312, 319, 94 S.Ct. 1704, 1707 (1974). The Commission can never again issue a report since it no longer exist. The rule that a claim does not become moot where it is capable of repetition, yet evades review does not apply to the facts of this case. "[T]he capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subject to the alleged illegality." *City of Los Angeles v. Lyons,* 461 U.S. 95, 109, 103 S.Ct. 1660, 1669 (1983) (citing to *Defunis*). The plaintiffs can meet no such test in this case, thus the requests for injunctive relief and for a declaratory judgment must be denied.

Second, the Court is in agreement with the defendants when they argue that the Attorney General, the Public Printer and

the Superintendent of the Documents of the Government Printing office should not have been named a defendants in this action. Plaintiffs failed to allege facts that require that those defendants remain in the case. They will be dismissed.

Finally, the defendants argue that they are also entitled to summary judgment against the plaintiffs on the damage claims asserted against them. The defendant Commission members contend that they are private citizens appointed to a commission and are not government employees. Thus, they argue for that reason alone they are not subject to damages. Alternatively they argue that they are immune because the law was not clearly established. *See Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727 (1982). Last, they argue that in any event, special factors militate in favor of granting them immunity in this case. The Court concludes that it need not address the defendants' claim that they are private citizens, because, even assuming that they are government employees, they are entitled to qualified immunity.

The plaintiffs argue that they are entitled to pursue a claim for damages against the defendants under *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999 (1971). The defendants contend that they are entitled to qualified immunity.

As the Supreme Court has held, "[t]he resolution of immunity questions inherently requires a balance between the evils evitable in any available alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow,* U.S. at 813-14, S.Ct. at 2736. Thus, most public officers have been denied absolute immunity. U.S. at 814, S.Ct. at 2736. "At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of

public office." *Id.* (footnotes omitted). The Supreme Court also noted that: "Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official" and that "[d]ecisions of [the Supreme Court] have established that the 'good faith' defense has both an 'objective' and 'subjective' aspect. The objective element involves a presumptive knowledge of and respect for basic, unquestioned constitutional rights' " and "[t]he subjective component refers to 'permissible intentions'." *Harlow*, U.S. at 815, S.Ct. at 2736-37 (citations and footnotes omitted). The Supreme Court went on to note that the subjective element of the "good faith" defense has proved incompatible with the admonition that insubstantial claims should not proceed to trial, but on the other hand, motions for summary judgment filed pursuant to Fed. R. Civ. P. 56 cannot be a means for resolving questions of fact. U.S. at 815-16, S.Ct. at 2737. The Supreme Court observed that "the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions." U.S. at 816, S.Ct. at 2737. This is the subjective intent, however, and "[j]udicial inquiry into subjective motivation therefore may entail broadranging discovery and the deposing of numerous persons, including an official's professional colleagues" and such "[i]nquiries of this kind can be peculiarly disruptive of effective government." U.S. at 817, S.Ct. at 2737-38 (footnotes omitted). The high court then ruled that: "We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." U.S. at 818, S.Ct. at 2738 (citations and footnote omitted).

The test of "clearly established law" is not to be applied with a high degree of generality—for example whether the right of due process is clearly established under the Due Process Clause, for if so applied, "it would bear no relation-

ship to the 'objective legal reasonableness' that is the touchstone of *Harlow.*" *Anderson v. Creighton,* 107 S.Ct. 3034, 3039 (1987). The question in *Anderson* revolved around an action against a federal law enforcement officer who participated in a search that violated the Fourth Amendment. In addressing the issue, the Supreme Court stated:

> It follows from what we have said that the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials. But contrary to Creighton's [plaintiff's] assertion, this does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent that *Harlow* sought to minimize . . . The relevant question in this case, for example, is the objective (albeit fact specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. *Anderson's subjective beliefs about the search are irrelevant.*

S.Ct. at 3040.

In the view of this Court, the decisions in *Harlow* and *Anderson* lead to the conclusion that discovery in this case is unwarranted and unnecessary. This case represents a prime example of what the Supreme Court was trying to avoid when it limited a court's consideration to the objective rather than the subjective. The Commission involved in this case was a Commission of citizens created pursuant to the FACA. To allow the plaintiffs to pursue discovery and an action for damages, would most likely deter "able citizens from acceptance" of such assignments in the future. The Commission members served without pay. Such citizens must be able to call it as they see it, else they will be of little or no benefit to

the government. While it is true that this Court concluded in granting injunctive relief that the Commission members exercised poor judgment in sending out the February letter, their actions in doing so is similar to the actions of federal agent Anderson who participated in a search in violation of the Fourth Amendment. Of course, there is a clearly established First Amendment right enjoyed by these plaintiffs, but the question is whether the defendants, by their action, based on the facts and information before them, violated a clearly established right. The Court concludes that they did not.

First, the Commission was given a fairly broad mandate to investigate the impact of pornography on society. And that investigation was to include changes in the nature of pornography, its volume, how it relates to children, *an examination of the means of production and distribution of pornography*, the impact of its distribution on adults and children and a review of efforts by governments to curb pornography. The Commission held hearings in six cities and when it received testimony concerning the distribution of pornography by certain corporations it had several choices. The Commission could have merely referred to that testimony in its reports, either naming or not naming the corporation; it could have ignored the testimony; or it could have elected to advise the corporations of the nature of the allegations and allow the corporations to respond. To have exercised the first choice would have been unfair, and to have exercised the second choice would not have been living up to the Commission's mandate. Clearly, it seems that the best choice was to give the corporations a chance to respond. As the Court noted above, the fault was in the method of seeking additional information and the phrasing of the February letter in a manner which suggests that absence of a response might mean that the corporations' names would be included in the report. However, while the defendants may have made a mistake, that mistake is no cause to subject them to damages.

When this Court heard the motion for a preliminary injunction, it relied in part on the decision in *Bantam Books, Inc. v. Sullivan, supra.* While the facts in *Bantam* are similar to those in the instant case, *Bantam* can be distinguished from this case based on several crucial facts. For example, while this case involves a commission established to investigate and make recommendations, the commission in *Bantam* was designed to encourage morality in youth. While the Commission in this case sent the February letter to the corporations to obtain a response, if any, concerning allegations made against the corporations by a person testifying before the Commission, the Commission in *Bantam* advised distributors of magazines and other reading material that certain magazines or books had been found "objectionable." Moreover, the *Bantam* Commission followed up such notifications with visits by police officers, effectively enforcing the decision of the Commission.

Although on the face both cases appear to be similar, closer examination of the facts in this case reveal that there are important differences. The Court concludes that *Bantam* is not a basis for determining that the defendants in this case violated clearly established law.

Finally, there are factors which also cause this Court to hesitate in finding potential liability on behalf of these defendants. *See Chappell v. Wallace,* 462 U.S. 296, 103 S.Ct. 2362 (1983). It is the same hesitation which resulted in the Court not granting the complete injunctive relief requested by the plaintiffs. First, as noted above, the instant case involves a citizens' commission, charged with the responsibility of investigating pornography. To allow damages against such citizens would be to discourage citizen participation in the future. This is especially so in the litigious society that is the modern day United States. Moreover, a decision allowing damages would no doubt chill inquiry of this nature—thus depriving other citizens of their First Amendment rights to speak out and be heard on such sensitive subjects.

The Court is satisfied that the defendants are entitled to qualified immunity and the latter factors support that decision. The Court concludes that the defendants' motions for summary judgment should be granted and these cases should be dismissed with prejudice. While the Court has not addressed every issue raised by the parties, it finds that the issues addressed are dispositive.

An appropriate order has been filed.

JOHN GARRETT PENN
United States District Judge

Filed
Jul 31, 1990
Clerk, U.S. District Court
District of Columbia

No. 91-1040

In the Supreme Court of the United States

OCTOBER TERM, 1991

PENTHOUSE INTERNATIONAL, LTD., PETITIONER

v.

EDWIN MEESE, III, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the former Attorney General and the former Members and Executive Director of the Attorney General's Commission on Pornography are entitled to qualified immunity from a civil damages action based upon the Commission's communications with various corporations concerning pornography.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1040

PENTHOUSE INTERNATIONAL, LTD., PETITIONER

v.

EDWIN MEESE, III, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a, 19a-20a) is reported at 939 F.2d 1011. The order and memorandum opinion of the district court (Pet. Supp. App. 25a-40a) is reported at 746 F. Supp. 154.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1991. A petition for rehearing was denied on September 24, 1991. Pet. App. 21a-22a. The petition for a writ of certiorari was filed on December 23, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, Attorney General William French Smith chartered a federal advisory committee known as the Attorney General's Commission on Pornography. Pet. App. 2a. The Commission was created pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1 *et seq.*, "to determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees." Pet. App. 2a; Pet. Supp. App. 32a. The Commission's inquiry included "a study of the dimensions of the problem of pornography" and "the means of production and distribution of pornographic materials * * *." *Ibid.* The Commission was given no prosecutorial, enforcement, or regulatory authority. See *ibid.*; 5 U.S.C. App. 2(b)(6), 9(b).

In May, 1985, Attorney General Edwin Meese III appointed eleven Members and an Executive Director to the Commission.[1] During 1985 and early 1986, the

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[1] The Commissioners, all respondents herein, were: Dr. Judith Becker, a clinical psychologist and professor at the University of Arizona; Diane D. Cusack, a local Scottsdale, Arizona public official; Dr. Park Elliot Dietz, a psychiatrist; Dr. James C. Dobsen, a psychologist and President of Focus on the Family; the Honorable Edward J. Garcia, United States District Judge for the Eastern District of California; Ellen Levine, Vice President and Editor in Chief of Womens Day Magazine; Harold (Tex) Lezar, a partner in the law firm of Carrington, Coleman, Sloman & Blumenthal; Rev. Bruce Ritter, the founder of Convenant House; Frederick Schauer, a Professor of Law at the Kennedy School of Government, Harvard University; Deanne Tilton, President of the Interagency Council on Child Abuse; and Henry E. Hudson, a

Commission held a series of six public hearings around the country and obtained testimony on the subject of pornography from more than 200 witnesses. Pet. App. 2a. At one such hearing, the Commission received testimony from Reverend Donald Wildmon, Executive Director of the National Federation of Decency, alleging that various corporations with "household names" distributed pornography by, among other things, selling *Playboy* and *Penthouse* magazines. *Id.* at 3a.

The Commission discussed Reverend Wildmon's testimony and decided to send a letter to the twenty-three corporations named by Reverend Wildmon, notifying them of the testimony and asking them to advise the Commission if they disagreed with it. Pet. App. 3a-4a.[2] The responses varied. One recipient

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former Commonwealth Attorney for Arlington County, Virginia and former United States Attorney for the Eastern District of Virginia. Mr. Hudson served as Chairman of the Commission. The Commission's Executive Director was Alan Sears, who is also a respondent herein.

[2] The letter, dated February 11, 1986, stated:

> Authorized Representative:
>
> The Attorney General's Commission on Pornography has held six hearings across the United States during the past seven months on issues related to pornography. During the hearing in Los Angeles, in October 1985, the Commission received testimony alleging that your company is involved in the sale or distribution of pornography. The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final report section on identified distributors.
>
> You will find a copy of the relevant testimony enclosed herewith. Please review the allegations and advise the Commission on or before March 3, 1986, if you disagree

called the testimony "outrageous," while others did not respond at all. The Southland Corporation, owner of the 7-Eleven chain of convenience stores, wrote that it had already decided to stop selling "adult" magazines in light of the public concern about the effects of pornography, and it urged the Commission to delete any references to Southland in its final report. *Id.* at 4a.[3]

2. In May, 1986, Playboy Enterprises, Inc. (which publishes *Playboy*) and petitioner (which publishes *Penthouse*) filed lawsuits alleging that the Commission's letter amounted to a prior administrative restraint in violation of the First Amendment. They sought an order requiring the Commission to withdraw its letter and to take other remedial action. The district court granted Playboy Enterprises' request for preliminary relief, holding that the plaintiff had

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with the statements enclosed. Failure to respond will necessarily be accepted as an indication of no objection.

Please call Ms. Genny McSweeney, Attorney, at (202) 724-7837 if you have any questions.

Thank you for your assistance.

Truly yours,

/s/ Alan E. Sears
Alan E. Sears
Executive Director

enc: Self-Addressed
Postage Paid Mailing Label

Pet. App. 3a-4a. Neither the letter nor the enclosure identified Reverened Wildmon as the source of the testimony.

[3] Petitioner alleges that Southland's decision was influenced by a telephone communication from an unidentified Commissioner suggesting that there was a link between magazines such as *Playboy* and child abuse and that the Commission intended to publish that finding in its report. Pet. App. 4a.

shown that it was likely to prevail on the merits of its claim. *Playboy Enterprises, Inc.* v. *Meese*, 639 F. Supp. 581 (D.D.C. 1986). The district court directed the Commission to send a follow-up letter to the named corporations, advising them that the original letter had been withdrawn, that no reply was required, and that their names would not be included in the Commission's final report as distributors of pornography. The Commission complied. Pet. App. 5a.

Petitioner subsequently amended its complaint to eliminate certain claims and to add a claim for money damages under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Respondents moved the district court to dismiss the action. The court granted respondents' motion, holding that any request for further equitable relief was moot and that petitioner's damages claim was barred by the doctrine of qualified immunity because the Commission's actions did not violate any clearly established rights. Pet. Supp. App. 33a-40a.

3. The court of appeals affirmed. Pet. App. 1a-20a. The court of appeals agreed with the district court that the Commission's actions did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 10a (emphasis omitted), quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982). The court rejected petitioner's argument that this Court's decision in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963) —which invalidated a state agency's practice of proscribing "objectionable" publications and recommending prosecutions—established respondents' liability. The court of appeals noted that the "Advisory Commission had no equivalent tie to prosecutorial power

nor authority to censor publications." Pet. App. 6a-8a.

The court also rejected petitioner's argument that the Commission's letter and an unidentified Commissioner's alleged telephone conversation (see note 3, *supra*) violated the First Amendment by implicitly criticizing the *Penthouse* publication. The court explained that, even if the communications rose to the level of criticism, "when the government threatens no sanction—criminal or otherwise—we very much doubt that the government's criticism or effort to embarrass the distributor threatens anyone's First Amendment rights." Pet. App. 9a. The court added that "even if the facts of this case were to make out such a cause of action, certainly no court has ever so held." *Id.* at 9a-10a.[4]

The court found no merit in petitioner's argument that summary judgment was improperly granted before petitioner had an opportunity to pursue discovery concerning the Commission's intent in sending the letter. The court concluded that "the government's motive is irrelevant" to the First Amendment issue in this case and that the district court did not err in granting summary judgment without further discovery. Pet. App. 11a-12a. The court also concluded that the Commission's letter inquiring "into the distribu-

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[4] The court concluded that petitioner's reliance on the court's prior decision in *Hobson* v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985), was misplaced. In *Hobson*, the court held that FBI agents violated the First Amendment by surreptitiously publishing false information to disrupt certain political organizations. The court explained that in *Hobson*, unlike here, the defendants acted as governmental "agents provocateurs" who published false information while failing to disclose "that the government was involved at all." Pet. App. 10a.

tion of pornography" was within the scope of its authority, *id.* at 12a-13a, and that petitioner's request for declaratory relief was moot, *id.* at 14a-17a.

Judge Randolph concurred in the judgment of immunity on the basis that there is no "clearly established doctrine that the sort of governmental interference alleged here * * * violates the First Amendment." Pet. App. 18a.

ARGUMENT

The court of appeals correctly concluded that respondents are entitled to qualified immunity. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Petitioner argues that the decision below is inconsistent with this Court's decision in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963) and "poses a grave threat to the First Amendment" by "[p]ermitting government officials to censor speech with which they disagree." Pet. 10. That argument incorrectly characterizes the issue in this case. The question here is not whether the court's decision promotes First Amendment values. Rather, the question is whether respondents are entitled to qualified immunity from petitioner's civil suit for damages.

This Court has already established the standard for determining whether a government official is entitled to qualified immunity. The official enjoys qualified immunity unless he has violated "clearly established * * * constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. at 818. The "right" at issue must be "clearly established" in the "particularized" sense that "a reasonable official would understand that

what he is doing violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Ibid.* (citations omitted).

As the courts below correctly held, petitioner is unable to show that respondents have violated a "clearly established" right. Petitioner errs in contending that the Commission's February 11, 1986, letter violates the First Amendment principles set forth in *Bantam Books*. The Court concluded in that case that a state agency engaged in unlawful censorship through a system of informal sanctions, including "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation." 372 U.S. at 67.[5] The Commission did not engage in any such practices here. The Commission had no authority to identify "objectionable" publications or recommend prosecutions, and the letter it sent "contained no threat to prosecute, nor intimation of intent to proscribe the distribution of the publications." Pet. App. 7a. Thus, *Bantam Books* does not establish that

[5] The state agency, the Rhode Island Commission To Encourage Morality In Youth, had the authority "to investigate and recommend the prosecution of all violations" of state obscenity laws. 372 U.S. at 60 n.1. It vigorously exercised that authority by notifying distributors that certain designated books were "objectionable," by informing them that a list of those publications had been "circulated to local police departments," and by following up that notification with a visit from a police officer "to learn what action [the distributor] had taken" in response to the Commission's notice. 372 U.S. at 61-63, 68.

a reasonable official would have considered respondents' actions unlawful.[6]

The other First Amendment decisions that petitioner cites are far afield from this case.[7] As peti-

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[6] As the court of appeals recognized, even if the Commission's letter could be read as criticism of petitioner's publication, the letter would not be unlawful. Pet. App. 9a-10a. As the court had previously stated, "[w]e know of no case in which the first amendment has been held to be implicated by governmental action consisting of no more than governmental criticism of the speech's content." *Block* v. *Meese*, 793 F.2d 1303, 1313 (D.C. Cir.), cert. denied, 478 U.S. 1021 (1986).

[7] See *Simon & Schuster, Inc.* v. *New York State Crime Victims Board*, 112 S. Ct. 501 (1991) (state statute regulating distribution of the proceeds of communicative works describing criminal activity); *Rust* v. *Sullivan*, 111 S. Ct. 1759 (1991) (regulations governing abortion counselling by recipients of federal family planning funds); *Rutan* v. *Republican Party*, 110 S. Ct. 2729 (1990) (state's use of partisan political affiliation in making hiring, promotion, transfer and recall decisions governing employees); *United States* v. *Eichman*, 110 S.Ct. 2404 (1990) (flag burning prosecution); *Ex Parte Jackson*, 96 U.S. 727 (1877) (state prosecution for violation of postal regulations prohibiting the mailing of obscene matter); *Drive In Theatres, Inc.* v. *Huskey*, 435 F.2d 228 (4th Cir. 1970) (sheriff's threat to confiscate all films not rated "G" and to prosecute distributors of such films for obscenity); *Council For Periodical Distributors Ass'n* v. *Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), aff'd, 827 F.2d 1483 (11th Cir. 1987) (district attorney's threats to prosecute magazine distributors and use of other "coercive state power" to achieve suppression of publications); *ACLU* v. *City of Pittsburgh*, 586 F. Supp. 417 (W.D. Pa. 1984) (Mayor's demand that publications be removed by distributors under threat of "initiation of criminal proceedings"); *Penthouse International, Ltd.* v. *Putka*, 436 F. Supp. 1220 (N.D. Ohio 1977) (Mayor's use of municipal authority under vending concession agreement to demand removal of publications); *Hammond* v. *Brown*, 323 F. Supp. 326 (N.D. Ohio 1971) (special grand

tioner seems to recognize, the outcome in each of those cases turned on whether the government had engaged in "the suppression of ideas through the exercise or threat of state power." See Pet. 12, quoting with approval, *Block* v. *Meese*, 793 F.2d 1303, 1314 (D.C. Cir.) cert. denied, 478 U.S. 1021 (1986). That element is missing here. The Commission's letter, which was intended to give recipients an opportunity to respond to Reverend Wildmon's public testimony, did not involve suppression of ideas through the threat of state power. Rather, it allowed the recipients to express their disagreement with Reverend Wildmon's views. See Pet. App. 7a, 9a.[8]

There also is no basis for subjecting respondents to suit based on an alleged telephone call from an unnamed Commissioner to Southland Corporation informing the company that the Commission's report would link *Playboy* and similar publications to child abuse. See Pet. 3, 4, 13; Pet. App. 4a. Even if the conversation took place as petitioner alleged, the Commissioner simply related information as to the possible contents of the Commission's report. The

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jury report issued in conjunction with criminal prosecutions as a result of Kent State riot); *Liveright* v. *Joint Committee of the General Assembly*, 279 F. Supp. 205 (M.D. Tenn. 1968) (legislative investigation into "civil rights" organization using the powers of compulsory process with criminal sanctions for any failure to comply).

[8] Petitioner also mistakenly relies (Pet. 7, 10) on *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960). That case, like *NAACP* v. *Alabama*, 357 U.S. 449 (1958), "implicate[s] a separate interest—that against compelled disclosure as an infringement of the First Amendment guarantee of privacy of association and belief." Pet. App. 8a n.2. Petitioner has not alleged the infringement of such an interest and hence the case is "inapposite." *Ibid.*

court of appeals properly rejected the notion that "the truth or falsity" of the Commissioner's alleged statements could provide "a basis for a constitutional tort." *Id.* at 12a. As Judge Randolph noted in his concurrence, there is no "clearly established doctrine that the sort of governmental interference alleged here * * * violates the First Amendment." *Id.* at 18a.

The court of appeals' finding that respondents are entitled to immunity from petitioner's damages action is not only consistent with *Harlow*'s qualified immunity standard, but it is also consistent with the underlying interests that the *Harlow* standard is designed to protect. As the Court explained, qualified immunity is intended to give public officials the latitude they need to discharge their responsibilities. 457 U.S. at 814. In the case of federal advisory committees, members must be able to communicate freely with each other and the public to obtain information and input. If advisory committees and their members cannot engage in a dialogue with affected members of the public without fear of a damages suit, the committees will be of little or no benefit to the government. Pet. App. 8a.

2. Petitioner also claims that the court of appeals' decision improperly extends qualified immunity to public officials who have exceeded the scope of their discretionary authority. Pet. 18-20. In particular, petitioner points to the alleged telephone call from an unidentified Commissioner to Southland as an action that "surely exceeded the Commission's limited mandate." Pet. 19. Petitioner's challenge is without merit and does not warrant further review.

First, petitioner's charge that the alleged telephone call exceeded the scope of the Commission's authority was neither presented by petitioner in its briefs to the court of appeals nor considered by that court.

Rather, that argument was raised for the first time in the petition for rehearing. As Judge Randolph expressly observed, a court is under no obligation to consider issues that are not raised in a timely manner. Pet. App. 22a. Similarly, "[t]his Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). On that basis alone, this Court should deny review.[9]

In any event, petitioner's contention is incorrect. As the district court noted, the Commission "was given a fairly broad mandate to investigate the impact of pornography on society." Pet. Supp. App. 38a. That mandate explicitly included the study of "pornography that relates to children" as well as "a review of the available empirical and scientific evidence on the relationship between exposure to pornographic materials and antisocial behavior" and the

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[9] Petitioner cites *Cohen* v. *Cowles Media Co.*, 111 S.Ct. 2513, 2517 (1991), to suggest that the Court should consider the issue even though it was not raised below. Pet. 19 n.13. The *Cowles* decision, however, has no bearing here. *Cowles* states that "[i]t is irrelevant to this Court's *jurisdiction* whether a party raised below and argued a federal-law issue *that the state supreme court actually considered and decided.*" 111 S.Ct. at 2517 (emphasis added). The issue here is whether, as a prudential matter, the Court should review an issue that was neither raised nor decided in the court of appeals. Petitioner mistakenly relies on *Detro* v. *Roemer*, 732 F. Supp. 673 (E.D. La. 1990), for the proposition "the charge of *ultra vires* conduct cannot be resolved on a motion for summary judgment." Pet. 19. Because petitioner never presented its claim to the district court (Pet. Supp. App. 27a-40), it can hardly claim that the district court erred by not denying summary judgment on that basis.

"commissioning of new research on these subjects." *Id.* at 32a.

A telephone call discussing the possible links between *Playboy* and similar magazines to child abuse is well within the scope of the Commission's mandate. The conversation, if it occurred, is clearly "not 'manifestly or palpably beyond [the Commission's] authority.'" *Briggs* v. *Goodwin*, 569 F.2d 10, 15-16 (D.C. Cir. 1977), cert. denied, 437 U.S. 904 (1978), quoting *Spaulding* v. *Vilas*, 161 U.S. 483, 498 (1896).[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1992

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[10] See *Haynesworth* v. *Miller*, 820 F.2d 1245, 1264-1265 (D.C. Cir. 1987); *Gray* v. *Bell*, 712 F.2d 490, 505 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984). See also *Gregorie* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).

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No. 91-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PENTHOUSE INTERNATIONAL, LTD.,

Petitioner,

against

EDWIN MEESE III, Attorney General of the United States, HENRY E. HUDSON, DR. JUDITH VERONICA BECKER, DIANE D. CUSACK, PARK ELLIOTT DIETZ, JAMES C. DOBSON, EDWARD J. GARCIA, ELLEN LEVINE, HAROLD (TEX) LEZAR, REV. BRUCE RITTER, FREDERICK SCHAUER and DEANNE TILTON-DURFEE, Members of the Attorney General's Commission on Pornography, and ALAN EDWARD SEARS, Executive Director of the Attorney General's Commission on Pornography,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, THE FREEDOM TO READ FOUNDATION, INDEPENDENT VIDEO RETAILERS ASSOCIATION, NATIONAL ASSOCIATION OF COLLEGE STORES, INC., PERIODICAL AND BOOK ASSOCIATION OF AMERICA, AND RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. AS *AMICI CURIAE*, IN SUPPORT OF PETITIONER.

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No. 91-1040

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STATEMENT

The Council for Periodical Distributors Associations, The Freedom to Read Foundation, Independent Video Retailers Association, National Association of College Stores, Inc., Periodical and Book Association of America, and Recording Industry Association of America, Inc.[1] submit this joint brief, *amici curiae*, urging reversal of the decision below. The brief is submitted upon the written consents of counsel to both petitioner and respondents, which are submitted herewith.

THE *AMICI*

Amici's members publish, produce, distribute and sell books, magazines, recordings and other communicative materials of all types, including those which are scholarly, literary, scientific and entertaining. As mainstream distributors and booksellers who distribute and sell popular, literary, scientific and scholarly books and periodicals, *amici* have a significant interest in the resolution of the issue before the Court. *Amici*'s members do not own what are commonly referred to as "adult" stores; nor do they distribute "adult" materials normally found in such stores. *Amici*'s members do, however, distribute and sell mainstream materials which, while not obscene, contain sexually frank matter or other matter that certain persons may find objectionable.

The Council for Periodical Distributors Associations is the national trade association for approximately 400 independent local wholesale distributors who distribute over ninety-five percent of all magazines, comic books, paperback books and newspapers in every state of the United States.

The Freedom to Read Foundation, a non-profit membership organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein

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[1] The *amicus curiae* organizations, together with their respective members, are referred to collectively as "*amici*."

every citizen's First Amendment freedoms are fulfilled; to support the rights of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

The Independent Video Retailers Association is a membership organization whose more than 3,000 members own and operate more than 4,300 general interest, full-service video stores in communities throughout the United States.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,850 college stores located throughout the United States.

The Periodical and Book Association of America is an association of magazine and paperback book publishers who rely on newsstand sales and who distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada.

The Recording Industry Association of America, Inc. ("RIAA") is a not-for-profit corporation whose member companies create and produce sound recordings and manufacture and distribute phonorecords. The members of the RIAA account for approximately ninety-five percent of all authorized phonorecords produced, manufactured and sold in the United States, including longplaying records, cassette tapes and compact discs. The RIAA and its members have a continuing commitment to preserving the freedom of artists to create musical works of interest to all segments of the public.

INTEREST OF THE *AMICI*

Amici have a continuing interest in the decisions of this Court balancing First Amendment rights and restrictions on material with sexual content. *Amici*'s brief will demonstrate how the legal principles involved in this case affect mainstream publishers, producers, distributors and retailers who publish, produce, distribute and sell popular, literary, scientific and scholarly books and periodicals and recordings that contain sexual content but are not obscene.

This case presents the issue of whether it is constitutional for government officials to send letters on official Justice Department stationery threatening to blacklist and publicly stigmatize mainstream retailers and wholesalers as pornographers, and implying that prosecution might follow unless they cease distributing materials which are not obscene and are clearly protected by the First Amendment. The Court of Appeals characterized this issue as one of "first impression" which this Court has been reluctant to decide, and held that, in the absence of an explicitly stated threat of criminal prosecution, the actions of the officials were constitutional.

This is not, however, a case of first impression. This Court and the federal courts generally have not been reluctant to confront this type of governmental misconduct and label it unconstitutional. Neither the government nor the court below has presented any compelling rationale to distinguish this case from *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), which found such conduct to be "censorship effectuated by extralegal sanctions," and held it plainly unconstitutional. 372 U.S. at 72. Nor is there any compelling rationale to severely limit the holding of *Bantam Books* after almost three decades of providing a clearly understood shield against extralegal governmental suppression of First Amendment freedoms. *Amici* are deeply concerned about the inroad made by the decision below on the *Bantam Books* doctrine.

The privately communicated threats by a government commission to "identify" and publicly denounce as pornographers mainstream companies not involved in the pornography business intimidate retailers and others dealing with the public as effectively as direct threats of prosecution. When made with the intent of crippling concededly protected expression, they are every bit as unconstitutional. Moreover, when these threats emanate from prosecutorial or law enforcement agencies as they did here, they suggest that prosecution is imminent.

The threats made by the Commission in this case were as efficacious as a direct threat of prosecution. Southland Corporation (7-Eleven Stores), Rite Aid Drug Stores, Revco, Thrifty Drug, Dart Drug and other retailers and wholesalers discontinued distribution of petitioner's *Penthouse* magazine after receipt of the letters. Yet none

of the issues of *Penthouse* discontinued by distributors following the Commission's threats has ever been found by any court to be obscene.

Amici's members regularly face similar governmental misconduct and often are compelled to seek redress from the courts. *Bantam Books* and its progeny have allowed *amici*'s members to obtain that redress. If the decision below is permitted to stand, however, government officials may with impunity impose upon the public their views as to "appropriate" First Amendment material — provided they couch their threats in calculating and discreet verbiage. Such a result does more than cripple the circulation of *Penthouse* magazine. It chills the free exercise of First Amendment rights and eviscerates the holding of *Bantam Books*. *Amici* urge this Court to clearly reaffirm *Bantam Books* in its broadest scope.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS MISCONSTRUED THIS COURT'S DECISION IN *BANTAM BOOKS, INC. V. SULLIVAN*, 372 U.S. 58 (1963)

On February 11, 1986, the Executive Director of the Attorney General's Commission on Pornography (the "Commission" or "Meese Commission") of the United States Department of Justice sent out a series of identical letters to 23 periodical distributors and retail chains (generally convenience store and drugstore chains) (a copy of one of these letters is attached as Exhibit A to this brief). The letters indicated that the addressee had been identified in testimony before the Commission as being "involved in the sale or distribution of pornography." Attached to the letter was a portion of the testimony before the Commission of Reverend Donald Wildmon (who was not identified), which repeatedly referred to petitioner's *Penthouse* magazine as pornographic and a "porn magazine." The letter offered the opportunity for the addressee to respond and disagree "prior to [the Commission's] drafting its final report section on identified distributors [of pornography]." *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1013 (D.C. Cir. 1991).

These letters were not the only scare tactic employed by the Commission. One member of the Commission personally called the general counsel of Southland Corporation to falsely assert that the Commission would link *Penthouse* and *Playboy* to child abuse. *Penthouse Int'l*, 939 F.2d at 1013. This assertion (not included in the Commission's final report) and the letters were instruments in an intentional effort by the Commission to intimidate distributors of *Penthouse* into discontinuing sales of the magazine. *See Playboy Enters., Inc. v. Meese*, 639 F. Supp. 581, 587 (D.D.C. 1986) ("it can be argued that the only purpose served by that letter was to discourage distributors from selling the publications"). Moreover, the Commission undertook this effort with the knowledge that *Penthouse* is not obscene under current legal standards,[2] and despite its understanding that "*governmental* condemnation may act effectively as governmental restraint." *Final Report* at 300 n.44 (referencing *Bantam Books*) (emphasis in original).

The Commission succeeded in its effort to intimidate the retailers. After receiving these letters, a number of Penthouse's largest distributors, including Southland (7-Eleven), Rite Aid Drug Stores, Revco, Thrifty Drug and Dart Drug, discontinued selling *Penthouse* magazine. The impact on distribution of *Penthouse* was severe, resulting in the loss of a substantial portion of its sales. The Commission achieved its goal of suppressing non-obscene, First Amendment protected material that some of its members (and Reverend Wildmon) found objectionable.

This result undermines the First Amendment. Similar results of similar actions by a state agency were vigorously condemned by this Court in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). In *Bantam Books*, the Rhode Island Commission to Encourage Morality

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[2] Indeed, whether *Penthouse* was legally obscene was of little concern to the Commission members. The Commission believed it had "both the right and the duty to condemn, in some cases, that which is properly constitutionally protected." *Attorney General's Commission on Pornography, Final Report* 300 n.44 (1986) (hereinafter "*Final Report*").

in Youth defended similar conduct on the grounds that the Commission was "limited to informal sanctions" (including "the threat of invoking legal sanctions and other means of coercion, persuasion and intimidation"), and therefore did "not regulate or suppress obscenity but simply exhort[ed] booksellers and advise[d] them of their legal rights." 372 U.S. at 66-67. This Court was not deceived, choosing to look "through forms to the substance." "The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication, *Lovell v. Griffin*, 303 U.S. 444, 452 [(1938)], and the direct and obviously intended result of the Commission's activities was to curtail the circulation in Rhode Island of books published by appellants." 372 U.S. at 65 n.6. Because "[p]eople do not lightly disregard public officers' thinly veiled threats . . . ," 372 U.S. at 68, the Court held that the Rhode Island Commission's system of informal censorship violated the Fourteenth Amendment.

As the district court in this case noted while granting injunctive relief, "[i]t hardly can be argued that the facts in *Bantam Books* and in the instant case are not similar." *Playboy Enters.*, 639 F. Supp. at 584-85. Despite the four-square precedent of *Bantam Books*, the Court of Appeals denied petitioner even the opportunity to prove its damages. It distinguished *Bantam Books* on the basis that the Meese Commission was not, by the terms of its enabling authority, specifically directed to recommend criminal enforcement. *Penthouse Int'l*, 939 F.2d at 1015. This distinction is inconsequential, and the exception to the *Bantam Books* doctrine proffered by the Court of Appeals should be rejected by this Court.

The form letter sent by the Meese Commission bears the indicia of the initial step on the road to prosecution. At the head it prominently bears the seal of the United States Department of Justice, well-known as the home of the federal prosecutor. On the right is the name of the "U.S. Department of Justice" and the designation that the Commission on Pornography belongs and is linked to the Attorney General — the federal government's chief prosecutor. The letter refers to alleged involvement in the sale or distribution of pornography. Finally, the letter states that "[f]ailure to respond will necessarily be accepted as an indication of no objection" to these allegations.

The federal courts have consistently applied the *Bantam Books* doctrine to such attempts to coerce the suppression of non-obscene material through the use of the indicia of prosecutorial authority. In a recent case involving similar coercive tactics, prosecutorial authorities in Alabama sent "informal invitations" on official letterhead to local retailers, stating that a task force had been investigating the sale of obscene materials, that the district attorney "would like to meet" with the retailers about magazines and books that "may be in violation of state obscenity laws," and that the retailers should call the police department and district attorney's office "to confirm your attendance at this meeting." *Council for Periodical Distribs. Ass'n v. Evans*, 642 F. Supp. 552, 555 (M.D. Ala. 1986), *aff'd*, 827 F.2d 1483 (11th Cir. 1987). The court saw through the informal form to the threatening substance, and found the letters unconstitutional. 642 F. Supp. at 565. The letters had achieved the desired result — many retailers discontinued selling *Playboy*, *Penthouse* and *New Look* magazines.

It is little wonder that Southland Corporation, Revco, Rite Aid, Thrifty Drug, Dart Drug and other businesses which received the Meese Commission's letters, while theoretically free to resist — as in *Bantam Books* and *Council for Periodical Distribs. Ass'n* — upon receipt of the letter chose to stop selling materials they knew to be protected. "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Bantam Books*, 372 U.S. at 68. The alternative was, at the least, public condemnation by a national commission headed by the federal government's chief law enforcement officer. At the worst, continued distribution threatened these businesspeople with prosecution, jail, ruin and lifelong stigma.[3] Not many drugstore and convenience store owners or chains would willingly place their livelihoods and reputations on the line to continue to sell *Penthouse*.

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[3] Among the recommendations promulgated by the Commission was that the Justice Department develop a special unit to enforce laws against sexually explicit materials and to aid state prosecutors in enforcing comparable state laws, *Final Report* at 436-37. In fact, the Justice Department has done so. *See, e.g., PHE, Inc. v. United States Dep't of Justice*, 743 F. Supp. 15 (D.D.C. 1990).

The fact that the Meese Commission's charter did not specifically empower the Commission to recommend criminal prosecutions was unknown to the recipients of the Commission's letters. Certainly, the letters did not say so. Nor did it really matter what the Commission's charter said. It was logical to assume that one agency of the Justice Department can and will refer matters to its sister divisions.

The position taken by the Court of Appeals that *Bantam Books* does not apply in the absence of an *explicit* threat of actual prosecution is a dangerous and inappropriate gloss on the First Amendment protection accorded by the *Bantam Books* doctrine. The *Bantam Books* majority looked "through forms to substance"; the court below overlooks substance for form.

II. GOVERNMENT THREATS INTENDED TO SUPPRESS PROTECTED EXPRESSION VIOLATE THE FIRST AMENDMENT

Amici's members have had a secure means of legal redress when confronted with attempts to blacklist them for engaging in expressive activities which are not obscene and therefore protected by the First Amendment. The federal courts have long recognized that threats of blacklisting, whether designated as such or labeled "legal advice" or "criticism," can be used by government officials to restrain protected speech. "It would be naive to credit the State's assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation independent of the laws against obscenity." *Bantam Books*, 372 U.S. at 68-69.

The court below, to the contrary, is serenely untroubled by the spectre of government blacklisting. "[T]his charge . . . says nothing more than that the Commission threatened to embarrass the distributors publicly." *Penthouse Int'l*, 939 F.2d at 1016. The Court of Appeals ignores the threat of impending sanctions implicit in the Commission's letter. More importantly, the Court of Appeals ignores the purpose of the threat, which was to suppress constitutionally-protected speech.

Oddly, the decision below instead categorizes the threat of blacklisting as part of the duties and among the rights of government officials. *See Penthouse Int'l*, 939 F.2d at 1016. The Court of

Appeals achieves that result by considering private threats of blacklisting as nothing more than "governmental criticism of the speech's content." In doing so, however, the court gravely misapprehends the nature of the Meese Commission's letter. The letter, written under the aegis of the Attorney General's office, threatened to publish a definitive report on the subject of pornography which would list mainstream drugstore and convenience store chains (all of which are heavily reliant on family business) as major distributors of "pornography." The Commission threatened calumny, not criticism.

The Meese Commission itself concedes that to "call something 'pornographic' is plainly, in modern usage, to condemn it. . . ." *Final Report* at 228. In the popular mind, "pornography" is synonymous with "obscenity" and, as such, carries overtones of criminality. Indeed, such an equation may even have been made by the author of the letter. At oral argument before the district court, "the defendants conceded that 'pornography' was not their word; rather it was the word of Reverend Wildmon. He does not define the word, and his written submission to the Commission demonstrates that he may very well equate 'pornography' with 'obscenity'." *Playboy Enters.*, 639 F. Supp. at 585.

The intended result of using the pejorative term "pornography" was to threaten a blacklist. "It must be borne in mind that the corporations receiving the letters included a number of drugstore chains and convenience store chains which greatly prize their family business. There is no question but that the suggestion that such organizations might be distributors of pornography was sensitive." *Playboy Enters., Inc. v. Meese*, 746 F. Supp. 154, 157 (D.D.C. 1990), *aff'd sub nom., Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011 (D.C. Cir. 1991). To avoid "run[ning] the risk of having themselves identified with pornography," 746 F. Supp. at 157, the distributors promptly discontinued selling the magazines. "[I]t seems more than ironic that many of the decisions not to sell were made *after the Commission's letters were sent out.*" *Playboy Enters.*, 639 F. Supp. at 585 (emphasis in original). Penthouse has demonstrated that retailers, fearing the public reaction to the condemnatory designation "pornography," drastically reduced the distribution of its publication. 639 F. Supp. at 585, 587-588.

The Circuit Court's analysis of the Commission's attempt to suppress the distribution of *Penthouse* and *Playboy* as a matter of the government's "right" of "vigorous criticism" is misleading. *Amici* do not dispute the right of members of the Meese Commission to criticize the content of *Playboy* and *Penthouse*. But by privately threatening to blacklist stores such as 7-Eleven, the Commission was not engaging in an "appeal to the public," or public speech at all. Rather, like a blackmailer, the Commission was privately threatening to destroy the reputation of mainstream businesses by associating them with a pejorative government label, and was implicitly threatening to prosecute them. The goal was *not* to engage in public criticism — in fact, no *public* criticism was made — but to suppress the protected expression with which Commission members and Reverend Wildmon disagreed. The private threats were thus a deliberate attempt to implement an informal system of prior restraint to suppress the distribution of non-obscene material. When the private threats achieved this unlawful aim, the Commission refrained from issuing the threatened blacklist.

Even if public criticism, rather than private blackmail, were the issue, it is beyond peradventure that the Commission's "right" and "duty" to "criticize" does not diminish the First Amendment protections embodied in *Bantam Books*. It is inconceivable that the government should assert First Amendment rights antagonistic to the interests of the larger community. This principle underlies many areas of our law,[4] but none so securely as the protection of First Amendment

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[4] For example, restraints are routinely placed on the rights of speech of government prosecutors. *See, e.g., Griffin v. California*, 380 U.S. 609, 615 (1965) ("the Fifth Amendment, in its direct application to the Federal Government . . . [forbids] comment by the prosecution on the accused's silence"). The speech of non-prosecutorial government officials is also restricted when antagonistic to the constitutional rights of the larger community. *See, e.g., Lombard v. Louisiana*, 373 U.S. 267 (1963) (city officials' public statements that blacks would not be permitted desegregated service in restaurants violated the Equal Protection Clause).

freedoms. Indeed, the speech in *Bantam Books* was as much "public criticism" as the speech here.

The court below principally relied on *Block v. Meese*, 793 F.2d 1303 (D.C. Cir. 1986), *cert. denied*, 478 U.S. 1021 (1987), to justify its lack of concern with the Commission's threat of blacklisting. This reliance is misplaced. *Block* and a related Supreme Court case, *Meese v. Keene*, 481 U.S. 465 (1987),[5] involved the Foreign Agents Registration Act ("FARA"), under which the Justice Department classifies films, registers distributees, and designates certain films as "political propaganda." *Keene* and *Block* held that labeling films "political propaganda" was not an act of blacklisting, because that designation is defined by statute in a non-condemnatory and not even particularly stigmatizing fashion. *Keene*, 481 U.S. at 483-85 (referring to 22 U.S.C. §§ 611-621); *Block*, 793 F.2d at 1311-12 (same). These distinctions are important: as we have discussed, "pornography" carries overtones of criminality and unquestionably would stigmatize drugstore and convenience store chains that rely on family business.

Moreover, in *Keene* and *Block* the Court and the District of Columbia Circuit concluded that labeling films furthered legitimate governmental purposes and was not motivated by a scheme to approve or condemn speech with the consequence of suppressing it. *Keene*, 481 U.S. at 484-85; *Block*, 793 F.2d at 1314. The trial court in this case found, however, that "the letter does not appear to be in furtherance of the work of the Commission. This being so, it can be argued that *the only purpose served by the letter* was to discourage distributors from selling the publications; a form of pressure amounting to an administrative restraint of the plaintiffs' First Amendment rights." *Playboy Enters.*, 639 F. Supp. at 587 (emphasis added).

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[5] The Court of Appeals decision relies heavily on *Block*, but pays scant attention to the more recent *Keene* case. Significantly, however, this Court in *Keene* pointedly avoided endorsing the broad language of *Block* with respect to the rights of government officials to "criticize" the speech of private citizens.

The court below cavalierly disregards the Commission's motivation. *Block* requires a closer analysis. "The line of permissibility, we think, falls . . . between the *disparagement* of ideas (general or specific) and the *suppression* of ideas through the exercise or *threat* of state power. If the latter is rigorously proscribed, *see Bantam Books* . . . , the former can hold no terror." *Block*, 793 F.2d at 1314 (emphasis added).

When the Attorney General, with all the panoply of his prosecutorial office, lends his authority to a man like Reverend Wildmon, whose stated goal is to "cripple" Playboy and Penthouse, *Penthouse Int'l*, 939 F.2d at 1013, few mainstream retailers will wait to see what is coming next. The drugstores and convenience stores pulled the plug on the magazines before the Justice Department pulled the plug on them. As in *Council for Periodical Distribs. Ass'n v. Evans*, "the words and deeds" of the Commission were calculated to and succeeded at provoking "retreat by those who dared to sell sexually explicit magazines." 642 F. Supp. at 563. Neither *Block* nor any other case sanctions such conduct.

III. THE DOCTRINE ENUNCIATED IN *BANTAM BOOKS* PROTECTS AGAINST GOVERNMENT ATTEMPTS TO INFORMALLY CENSOR PROTECTED EXPRESSION

Amici have learned from hard experience that government prosecutors, in their eagerness to attack the social harms some perceive to stem from the prevalence and accessibility of sexually related material, increasingly treat constitutionally protected but sexually frank books, periodicals and videos identically with materials which are obscene and not protected. Either because these prosecutors recognize that the sexually frank material they seek to suppress is not legally obscene, or because they recognize that their odds of actually obtaining a guilty verdict on obscenity charges is slim, they often employ informal schemes of suppression similar to that attempted by the Meese Commission. *Amici* and their members are legitimate, non-"adult" businesses, and for that reason are often targeted for prosecutorial intimidation aimed at eliminating constitutionally protected material because they are more vulnerable to "informal" intimidation than purveyors of hard-core pornography.

Whether the material targeted for suppression is *Playboy* magazine, a record album by risque rappers, or the multi-million bestselling guide *The Joy of Sex*, *amici* often have been compelled to seek shelter under the protective umbrella of *Bantam Books*. Fortunately for *amici*, other courts have been more alert than the court below to schemes to informally suppress protected speech. For example, when the Broward County, Florida sheriff's department began visiting record stores, presenting store managers with a "probable cause order" that a popular recording was obscene, and informally advising store managers to discontinue sales (which, within days, all record stores in the county did), a federal court intervened. The actions of the sheriff's department, the court found, subjected the recording "to an unconstitutional prior restraint and the plaintiffs' rights to publish presumptively protected speech were left twisting in the chilling wind of censorship." An injunction issued. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 600 (S.D. Fla. 1990).

In Colonial Heights, Virginia, police officers entered a Waldenbooks store and demanded that the manager remove *Playboy*, *Playgirl* and *Penthouse* magazines from the shelves, on pain of arrest and prosecution if she failed to comply. Walden Book Company sought an injunction under the *Bantam Books* doctrine, and ultimately obtained a consent decree and final judgment that town police would not "employ threats of prosecution or other informal enforcement methods to regulate the speech of plaintiffs. . . ." *Walden Book Co. v. City of Colonial Heights*, C.A. No. 89-424-R (E.D. Va. Aug. 23, 1989) (Consent Decree and Final Judgment). In Pittsburgh, the mayor wrote a letter threatening a massive sweep unless magazine and newsdealers agreed to stop selling a sexually oriented magazine. The district court, relying on *Bantam Books*, issued a permanent injunction against the mayor's misconduct. *American Civil Liberties Union v. City of Pittsburgh*, 586 F. Supp. 417 (W.D. Pa. 1984).

The Georgia Solicitor General orchestrated a series of warrantless arrests of newsstand operators selling magazines that arresting officers deemed obscene. The Fifth Circuit held that such action created an informal system of prior restraints and, relying on *Bantam Books*, sustained an injunction. *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980). When a North Carolina sheriff threatened prosecution of theatres exhibiting films with "R" or "X" ratings,

theatre owners sought the protection of the federal courthouse. Relying on *Bantam Books*, the Fourth Circuit found the "sheriff's method of informal censorship was an unconstitutional prior administrative restraint on free speech. . . ." *Drive-in Theatres, Inc. v. Huskey*, 435 F.2d 228, 230 (4th Cir. 1970). *See also Council for Periodical Distribs. Ass'n v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd*, 827 F.2d 1483 (11th Cir. 1987) (discussed *supra* at 8).

Of course, the federal courts' awareness of the dangers of "informal" suppression of speech did not originate with *Bantam Books*. *See, e.g., HMH Publishing Co. v. Garrett*, 151 F. Supp. 903, 904 (N.D. Ind. 1957) (prosecutor's conduct was an unconstitutional previous restraint when he prepared a list of publications he considered violative of the state's pernicious literature statute and, without actually threatening prosecution, transmitted this list to the attorney for a local magazine distributor, suggesting that "for the benefit of your client perhaps you might forward to him this list"). But *Bantam Books* has certainly provided the chief bulwark against such abuse. Even courts reluctant to deter "informal censorship" have felt obliged by the holding of *Bantam Books* to find such action to be an unconstitutional prior restraint. *See, e.g., Allied Artists Pictures Corp. v. Alford*, 410 F. Supp. 1348, 1354 (W.D. Tenn. 1976) ("Most reluctantly, but guided by the Supreme Court in [*Bantam Books*], the Court concludes that the actions of the Board under color of authority have operated, when viewed realistically, as a 'prior restraint'.").

Bantam Books protects speech even when a court order never issues. Parties similarly situated to *amici*'s members sought the assistance of the federal district court when an Ohio municipality wrote a local retailer, informing it that *Penthouse* and *Playboy* magazines were obscene and sales of the publications violated a village code. The case was settled on the agreement of the municipality not to undertake further action of that nature in the future. *Penthouse Int'l, Ltd. v. Laizure*, C88-4315A (N.D. Ohio) (Complaint filed Nov. 18, 1988).

Amici and its members are now in danger of losing a vital shelter for their First Amendment freedoms. The decision of the Court of Appeals eviscerates the *Bantam Books* doctrine. The opinion

effectively tells repressive groups within government, "speak softly, and you may carry a big stick." So long as prosecutors make no overt statement of intent to bring indictments, government threats against protected materials under the guise of "vigorous criticism" will be permitted to proceed.

That is not what *Bantam Books* means. That is not what the First Amendment means. *Amici* urge the Court to grant the petition for writ of certiorari to reaffirm these principles.

CONCLUSION

For the reasons set forth above, we respectfully urge that a writ of certiorari should issue to review and reverse the decision of the United States Court of Appeals for the District of Columbia Circuit.

February 21, 1992

Respectfully submitted,

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Authorized Representative :

The Attorney General's Commission on Pornography has held six hearings across the Unites States during the past seven months on issues related to pornography. During the hearing in Los Angeles, in October 1985, the Commission received testimony alleging that your company is involved in the sale or distribution of pornography. The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final report section on identified distributors.

You will find a copy of the relevant testimony enclosed herewith. Please review the allegations and advise the Commission on or before March 3, 1986, if you disagree with the statements enclosed. Failure to respond will necessarily be accepted as an indication of no objection.

Please call Ms. Genny McSweeney, Attorney, at (202) 724-7837 if you have any questions.

Thank you for your assistance.

Truly yours,

Alan E. Sears
Executive Director

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EXHIBIT A